(16,603 & 16,633.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 390.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

ELIZABETH L. W. BAILEY, ADMINISTRATRIX OF DAVIS W. BAILEY, DECEASED.

FILED JUNE 5, 1897.

No. 420.

ELIZABETH L. W. BAILEY, ADMINISTRATRIX OF DAVIS W. BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

FILED JULY 21, 1897.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from supreme court of the District of Columbia	1	1
Caption	1	1
Declaration and notice to plead (No. 24279)	1	1
Memorandum (pleas missing)	2	2

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 26, 1897.

	Original.	Print
Joinder of issue and replication	2	2
Order on suggestion of death of plaintiff	3	3
Memorandum (in reference to referee's report)	3	3
Order appointing J. J. Johnson referee	4	3
Exceptions to report of auditor	4	4
Memorandum (consolidated with No. 34564)	4	4
Memoranda (verdict and judgment)	4	4
Order vacating judgment	5	5
Order entering new judgment	5	5
Appeal by plaintiff	6	5
Citation	6	6
Waiver of bond	7	6
Memorandum (extension of term to settle bill of exceptions)	7	6
Order making bill of exceptions part of record	7	7
Declaration and notice to plead (No. 34564)	8	7
Particulars of demand	10	9
Affidavit of Elizabeth L. W. Bailey, administratrix	10	9
Pleas and affidavit of defendant	13	13
Joinder of issue	15	15
Order placing upon trial calendar and consolidating with No. 24279	16	15
Memoranda (verdict and motion for new trial)	16	15
Order overruling motion and entering judgment on verdict	17	16
Appeal by defendant	17	16
Citation	17	17
Memorandum (extension of term to settle bill of exceptions)	18	17
Order making bill of exceptions part of record	18	17
Bill of exceptions	19	18
Testimony of Wm. Preston Williamson	19	18
Letter of Attorney Thomas to Commissioners	24	23
Testimony of George C. Hazelton	24	23
John J. Johnson	25	24
Referee's report	27	26
Pleadings	27	26
Plaintiff's claim	28	27
Statement of facts	28	27
Findings of referee	29	28
Testimony of John W. Douglass	31	30
Elizabeth W. Bailey	32	31
John W. Ross	32	31
Proceedings in case No. 24279 (Bailey *vs.* D. C.)	33	33
Declaration	33	33
Memorandum (pleas missing from files)	34	34
Motion for judgment	35	34
Exceptions to report of J. J. Johnson, arbitrator	35	34
Motion for judgment on award	36	35
Referee's report	36	35
Pleadings	36	35
Plaintiff's claim	37	36
Statement of facts	37	36
Findings of referee	39	38
Testimony of W. Preston Williamson (rebuttal)	40	39
Geo. C. Hazelton (rebuttal)	41	40

	Original.	Print.
Plaintiff's request for instructions	41	40
Defendant's request for instructions	42	41
Charge to jury	43	42
Testimony before referee	48	47
Statement of W. Preston Williamson	48	47
Testimony of Francis D. Bailey	49	48
Report of F. V. Greene	76	75
Judge's certificate to bill of exceptions	78	77
Clerk's certificate to transcript	78	77
Minutes of argument	79	78
Opinion	80	78
Judgment (No. 585)	84	86
Petition of District of Columbia for writ of error	85	86
Submission of petition for writ of error	86	87
Order granting petition of District of Columbia for writ of error	86	87
Writ of error sued out by District of Columbia	87	87
Citation to Elizabeth L. W. Bailey, adm'x, and service of same	88	88
Clerk's certificate	89	89
Judgment (No. 584)	90	89
Petition of Elizabeth L. W. Bailey, adm'x, for writ of error	91	89
Order allowing petition of Elizabeth L. W. Bailey for writ of error	92	90
Bond on writ of error	93	90
Clerk's certificate	94	91
Writ of error sued out by Elizabeth L. W. Bailey, administratrix	95	91
Citation to the District of Columbia and service of same	96	92

1 In the Court of Appeals of the District of Columbia.

ELIZABETH L. W. BAILEY, Adm'x, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 584.

and

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH L. W. BAILEY, Adm'x. } No. 585.

Supreme Court of the District of Columbia.

ELIZABETH L. W. BAILEY, Administrator of Davis W. Bailey, Deceased,
vs.
THE DISTRICT OF COLUMBIA. } Nos. 24279 & 34564. At Law. Consolidated.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-mentioned causes, to wit:

Declaration and Notice to Plead.

Filed February 24, 1883.

In the Supreme Court of the District of Columbia, the 24th Day of February, 1883.

DAVIS W. BAILEY
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 24279.

The plaintiff sues the defendant for that heretofore, to wit, on the 30th day of July, 1879, at the city of Washington, in the District of Columbia, by certain articles of agreement then and there made, concluded, and agreed upon between the plaintiff, by the name and style of the Bailey French Paving Company, by D. W. Bailey, general agent, of the one part, and the defendant of the other part; one original of said articles of agreement, sealed with the seals of Seth L. Phelps, Josiah Dent, and William J. Twining as the then Commissioners of the District of Columbia, is now in the possession of the present Commissioners of said District, and the other original of said articles that was given to this he placed in the hands of the First Comptroller of the United States Treasury and has been unable to obtain a return of the same.

2

In said articles it was covenanted and agreed that the plaintiff

should resurface with asphaltum wearing surface the bituminous pavement upon certain streets and parts of streets in the city of Washington aforesaid named and specified in said articles of agreement, and the defendant covenanted with the plaintiff to pay him in consideration therefor certain sums of money named in said articles of agreement, and the plaintiff, at great cost and expense for plant, material, and labor, proceeded to carry out his part of said agreement and was carrying it out without any unnecessary delay and in a proper manner when he was forbidden by said Twining to proceed further with said resurfacing, and said order of said Twining was ratified and enforced by said Commissioners Phelps, Dent, and Twining, and the defendant refused to pay the plaintiff the sum it had covenanted to pay him by said articles of agreement, although often requested so to do.

And so the plaintiff in fact says that said defendant, although often requested so to do, has not kept said covenant so by it made as aforesaid, but has broken the same and to keep the same with the plaintiff has hitherto wholly neglected and refused and still neglects and refuses to keep the same, to the damage of the plaintiff of twenty-five thousand dollars.

And the plaintiff claims twenty-five thousand dollars, besides costs of suit.

O. D. BARRETT,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service thereof; otherwise judgment.

O. D. BARRETT,
Att'y for Plaintiff.

Memorandum.

Defendant's pleas filed April 4, 1883, missing from the files.

Joinder of Issue and Replication.

Filed April 18, 1883.

In the Supreme Court of the District of Columbia.

DAVIS W. BAILEY
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 24279.

The plaintiff joins issue on the defendant's first plea.

The plaintiff says that he never was indebted in manner and form as set forth in defendant's plea of set-off.

3 The plaintiff joins issue on the defendant's third plea.

The plaintiff says that after the expiration of the one hundred and twenty days referred to in defendant's fourth plea the defendant urged the plaintiff to complete the work called for by the

contract sued on, and, being so urged, he did complete a portion of it and was proceeding without unnecessary delay to complete the whole of it when he was ordered not to complete a certain portion of the work then not completed.

The plaintiff says that the exhaustion of the funds referred to in defendant's fifth plea was the result of their misappropriation by the defendant subsequent to the execution of the contract sued on.

O. D. BARRETT,
Att'y for Plaintiff.

Order.

Supreme Court of the District of Columbia, October Term, 1884.

Proceedings before the supreme court of the District of Columbia, holding a special term and circuit court, commencing the third Monday, it being the 20th day, of October, A. D. 1884.

MONDAY, *October 20th, A. D.* 1884.

By order of Alexander B. Hagner, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

WEDNESDAY, *January* 14, 1885.

Session resumed pursuant to adjournment, Hagner, justice, presiding.

* * * * * * *

DAVIS W. BAILEY, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 24279.

Now comes the plaintiff's attorney and suggests the death of the plaintiff and prays that the suit may be revived in the name of Elizabeth L. W. Bailey, his administratrix, and it is ordered accordingly.

Memorandum.

For referee's report see bill of exceptions, pages 64 to 71 and 86 to 141, both inclusive, of the record.

4 *Order Appointing J. J. Johnson Referee.*

Filed July 21, 1892.

L. R. 179,562.

L. S. 57521.

OFFICE OF THE
COMMISSIONERS OF THE DISTRICT OF COLUMBIA,
WASHINGTON, *January* 11, 1892.

Ordered that J. J. Johnson is hereby appointed referee in the matter of the suit of Bailey, administratrix of Bailey, deceased, *vs.* District of Columbia.

Official copy furnished Mr. J. J. Johnson.

By order:

W. TINDALL, *Secretary.*

B.

Exceptions to Report of Auditor.

Filed September 23, 1892.

In the Supreme Court of the District of Columbia, Holding a Circuit Court for said District.

ELIZABETH S. W. BAILEY, Adm'x of the Estate of Davis W. Bailey, Deceased,
vs.
THE DISTRICT OF COLUMBIA.
} At Law. No. 24279.

And now comes the defendant, The District of Columbia, and by its attorneys excepts to the report of the arbitrator, John J. Johnson, filed on the 18th day of July, 1892, in the above-entitled cause, and for exception says:

1. That the award is contrary to the evidence.
2. That the award is excessive.
3. That the evidence was insufficient to support the award.
4. Because of plain and palpable errors of law apparent on the face of the award.

GEORGE C. HAZELTON,
S. T. THOMAS,
Attorneys for the District of Columbia.

I consent that these exceptions be filed *nunc pro tunc.*
W. PRESTON WILLIAMSON,
Attorney for the Plaintiff.

Memorandum.

October 8, 1895.—Cause consolidated with No. 34564, at law, for trial.

Memoranda.

1896, January 13.—Verdict for defendant.
" " 18.—Judgment on verdict.

5 *Order.*

Supreme Court of the District of Columbia, January Term, 1896.

Proceedings before the supreme court of the District of Columbia, holding a circuit court, division number two, and special term in and for said District, commencing the first Tuesday, it being the 7th day, of January, A. D. 1896.

TUESDAY, *January 7th*, 1896.

By order of Honorable Louis E. McComas, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

TUESDAY, *January* 21, 1896.

Session resumed pursuant to adjournment, Mr. Justice McComas presiding.

* * * * * * *

ELIZABETH L. W. BAILEY, Adm'x, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 24279.

Upon motion of plaintiff, by her attorneys, to vacate the judgment heretofore entered in this cause, and the defendant consenting thereto, it is ordered that said judgment be, and the same is hereby, set aside and for nothing held.

* * * * * * *

ELIZABETH L. W. BAILEY, Administratrix of Estate of Davis W. Bailey, Dec'd, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 24279.

Upon hearing the defendant's motion for judgment upon the verdict rendered in the above-entitled cause on the 13th day of January, 1896, it is considered that said motion be granted. Therefore it is considered that the plaintiff take nothing by her suit, and that the defendant go thereof without day and recover against the plaintiff its costs of suit, to be taxed by the clerk, and have execution thereof.

6

Order for Appeal.

Filed February 1, 1896.

In the Supreme Court of the District of Columbia, the 31st Day of January, 1896.

ELIZABETH L. W. BAILEY, Admin'x of the Estate of Davis W. Bailey,
vs.
THE DISTRICT OF COLUMBIA. } Precipe. At Law. No 24279.

The clerk of said court will please enter this cause appealed to the Court of Appeals of the District of Columbia & issue a citation.

A. S. WORTHINGTON,
Attorney for Plaintiff,
P'r W. P. W.

In the Supreme Court of the District of Columbia.

ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased,
vs.
THE DISTRICT OF COLUMBIA.
At Law. No. 24279.

The President of the United States to The District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia on the 1st day of February, 1896, wherein Elizabeth L. W. Bailey, administratrix, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 1st day of February, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 1st day of February, 1896.

S. T. THOMAS,
Attorney for Appellee.

7 *Order Waiving Bond.*

Filed February 18, 1896.

In the Supreme Court of the District of Columbia, the — Day of ——, 189–.

ELIZABETH L. W. BAILEY, Administratrix of the Estate of Davis W. Bailey, Deceased,
vs.
THE DISTRICT OF COLUMBIA.
At Law. No. 24279.

The giving of a bond by the plaintiff in the above-entitled cause on her appeal to the Court of Appeals of the said District is hereby waived.

S. T. THOMAS,
Attorney for Def't.

Memorandum.

1896, April 6.—January term of court extended 30 days to settle bill of exceptions.

Supreme Court of the District of Columbia, January Term, 1896.

Proceedings before the supreme court of the District of Columbia, holding a circuit court, division number two, and special term in and for said District, commencing the first Tuesday, it being the 7th day, of January, A. D. 1896.

TUESDAY, *January 7th*, 1896.

By order of Honorable Louis E. McComas, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal, pursuant to rule of court.

* * * * * * *

MAY 5.

ELIZABETH L. W. BAILEY, Adm'x, Pl'ff, v. THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 24279 & 34564.

Now again comes here the defendant, by its attorneys, and tenders to the court here its bill of exceptions taken during the trial of this case and prays that it may be duly signed, sealed, and made a part of the record now for then, which is done accordingly.

8 *Declaration and Notice to Plead.*

Filed August 8, 1893.

In the Supreme Court of the District of Columbia.

ELIZABETH L. W. BAILEY, Administratrix of the Estate of Davis W. Bailey, Deceased, vs. THE DISTRICT OF COLUMBIA. } No. 34564. At Law.

First count. The plaintiff, administratrix of the estate of Davis W. Bailey, deceased, sues the defendant, a municipal corporation, for that whereas before the making of the promise and undertaking of the defendant hereinafter next mentioned certain differences had arisen and were then depending between the plaintiff and the defendant touching divers sums of money due and owing from the defendant to the plaintiff and touching certain work done for and materials furnished to the defendant by said Davis W. Bailey during his lifetime, to recover which sums of money and to recover compensation for said work done and materials furnished the plaintiff, as administratrix as aforesaid, had brought a suit at law in the supreme court of the District of Columbia against the defendant, and thereupon, for the putting an end to the said differences, the plaintiff and the defendant heretofore, to wit, on the eleventh day of January, A. D. 1892, at the District of Columbia, respectively submitted themselves to the award of one John J. Johnson to be made between them of and concerning said differences, and in consideration thereof, and that the plaintiff, at the special instance and request of the defendant, had then and there undertaken and

faithfully promised the defendant to abide by and perform and fulfill the award of the said John J. Johnson to be so made between the plaintiff and the defendant of and concerning said differences in all things therein contained on the plaintiff's part and behalf to be performed and fulfilled, it, the defendant, undertook and then and there faithfully promised the plaintiff to perform and fulfill said award in all things therein contained on the defendant's part and behalf to be performed and fulfilled; and the plaintiff in fact saith that the said John J. Johnson, having taken upon himself the burden of the said arbitrament and having given due notice to the plaintiff and defendant and heard and considered all evidence offered and all arguments made by the respective counsel of the plaintiff and defendant, afterwards, to wit, on the eighteenth day of July, A. D. 1892, at the District of Columbia aforesaid, made his certain award in writing between the plaintiff and the defendant of and concerning said differences, and did thereby award that the defendant should pay to the plaintiff the sum of $10,519.20 in full satisfaction and discharge of the said matters in difference; of which said award the defendant afterwards, to wit, on the day and year last aforesaid, at the District of Columbia aforesaid, had notice; and although it, the defendant, afterwards, to wit,
9 on the day and year last aforesaid, at the District of Columbia, was requested by the defendant to pay her the said sum of $10,519.20, according to the tenor and effect of said award and its said promise and undertaking, yet the defendant, not regarding its said promise and undertaking, did not nor would on the day and year last aforesaid or when it was requested as aforesaid or at any time afterwards pay said sum of $10,519.20 or any part thereof to the plaintiff, but has wholly neglected and refused and still refuses and neglects so to do, to wit, at the District aforesaid.

And the plaintiff claims under this count the sum of $10,519.20, with interest from the 18th day of July, 1892, besides costs of suit.

Second count. And the plaintiff, administratrix of the estate of Davis W. Bailey, deceased, sues the defendant, a municipal corporation as aforesaid, for that the defendant afterwards, to wit, on the 18th day of July, 1892, at the District of Columbia, was indebted to the plaintiff in the further sum of $10,519.20 upon and by virtue of a certain award made by John J. Johnson upon and by virtue of a certain submission before that time made by the plaintiff and the defendant to the award, order, and determination of the said John J. Johnson of and concerning all matters in difference then *and* depending between the plaintiff and the defendant, and upon and by virtue of which said reference said John J. Johnson had then and there awarded that the defendant should pay to the plaintiff said sum of $10,519.20, and, being so indebted, it, the defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the District of Columbia aforesaid, undertook and then and there faithfully promised the plaintiff to pay her the said last-mentioned sum of money when it, the defendant, should be therein afterwards requested. Yet the defendant, though often re-

quested, has not paid to the plaintiff said sum of $10,519.20 or any part thereof.

And the plaintiff claims under this count the sum of $10,519.20, with interest from the 18th day of July, 1892, besides costs of suit.

Third count. And the plaintiff, as administratrix of the estate of Davis W. Bailey, deceased, sues the defendant, a municipal corporation as aforesaid, for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims under this count $10,519.20, with interest from the 18th day of July, 1892, besides costs of suit, according to the particulars of demand hereto annexed.

A. S. WORTHINGTON AND
W. PRESTON WILLIAMSON,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first day of the first special term of this court occurring twenty days after service hereof; otherwise judgment.

A. S. WORTHINGTON AND
W. PRESTON WILLIAMSON,
Attorneys for Plaintiff.

10

Particulars of Demand.

WASHINGTON, D. C., *July* 24, 1893.

District of Columbia to Elizabeth L. W. Bailey, administratrix of the estate of Davis W. Bailey, deceased, Dr.

To amount found to be due from the District of Columbia to said Elizabeth L. W. Bailey, as administratrix as aforesaid, on the 17th day of July, 1892, by said John J. Johnson under a mutual submission to him of certain differences between said Elizabeth L. W. Bailey, administratrix as aforesaid, and the District of Columbia $10,519 20

Interest from the 10th day of July, 1892.

Affidavit.

In the Supreme Court of the District of Columbia.

ELIZABETH L. W. BAILEY, Administratrix of the Estate of Davis W. Bailey, Deceased,
vs.
THE DISTRICT OF COLUMBIA.
} No. —. At Law.

I, Elizabeth L. W. Bailey, on oath depose that I am, and ever since the seventeenth (17th) day of December, A. D. 1883, have been, administratrix of the estate of my late husband, Davis W. Bailey, under and by virtue of an appointment of the supreme court of the District of Columbia, holding a special term for the transaction of

orphans' court business. Said Davis W. Bailey died on the nineteenth (19th) day of June, A. D. 1883. Prior to his death he had done work for the District of Columbia and furnished it materials, and after his death and after I had become administratrix as aforesaid certain differences arose between the District of Columbia and myself, as administratrix as aforesaid, in regard to the amount due from the District of Columbia to my said husband at the time of his death on account of said work and materials, and these differences resulted in my bringing a suit at law against the District of Columbia in the supreme court of said District to recover the sum of twenty-five thousand dollars, which I claimed to be due me on said account. Said suit was still depending and undetermined when, on the 16th day of September, 1891, my attorney, W. Preston Williamson, at my request and in my behalf wrote and delivered to the Commissioners of the District of Columbia a letter, of which the following is a copy:

"WASHINGTON, D. C., *Sept.* 16, 1891.

To the honorable Commissioners of the District of Columbia.

GENTLEMEN: I have the honor to call your attention to the case of Davis W. Bailey *vs.* District of Columbia, No. 24279, at law,
11 now pending in the supreme court of said District. The grounds of said suit is for breach of contract, and the facts are as follows: On the 30th of July, 1879, Davis W. Bailey was awarded contract No. 222. Said contract was for resurfacing certain streets and parts of streets with asphaltum within and for the District of Columbia; that Congress appropriated for this particular and special work the sum of $100,000, naming it as 'repairs to concrete pavements.' The contract covered about 65,000 yards at a price averaging about 95 cents to the square yard. After Bailey had completed about 30,000 yards of said contract he was notified of the rescinding of the unexecuted balance of said contract, as is shown by Commissioner Twining's letter of February 12th, 1880. At this time Bailey had expended for machinery necessary to the execution of said contract $10,180; for stock on hand at date of cancellation of said contract, $7,000, which was almost a total loss to said Bailey. In addition to this, the profit on the unexecuted balance of said contract, with the stock, fixtures, and appliances on hand for its execution, as shown by schedule, $8,000; also the amount due Bailey for one-half inch extra surface not required by contract, $5,000; so by addition it will be seen at a glance that the amount due is $31,180. Now, the only defense which the District has been able to urge against this just and honest claim is, first, for the repairing of certain repairs on certain streets by said District the sum of $1,312.30 which is set up as a set-off, which the plaintiff is not and could not be liable for, as he did not bind himself by his contract to keep these repairs in repair and in which he is fully sustained by the letter of the 1st Comptroller of the Treasury Department dated July 22d, 1882. The second objection urged by the District is that the appropriation made by Congress for this work had been exhausted. The plain truth and facts are that the money appropriated by Con-

gress for this particular work was illegally and unlawfully diverted from its proper channel and expended for other purposes, to the great loss and damage of said Bailey, as he was ready, willing, and able to carry on his contract to completion when the fatal and disastrous letter from the Commissioners, notifying him that he must stop work, as the appropriation for said work had been exhausted, reached him. This was erroneous, as it was afterwards discovered that there were several thousand dollars still on hand available for said work; but it was then too late to prevent the loss and damage to said Bailey, for the large quantities of material which were on hand at the yards of said Bailey were almost a total loss to him, as is set forth in E. J. Hamner's letter, hereto attached and marked Exhibit No. 1. The third and last objection advanced by the District against the claim of said Bailey is that he delayed his work and did not complete it within the time specified in the contract. To that we answer that the delays were no fault of Bailey's, but were wholly and solely chargeable to the District of Columbia and its officers, for large quantities of extra work were piled upon Bailey
12 which the Commissioners admit over their own signatures were not anticipated, but must be first done by Bailey before he could go on and complete his work under said contract.

Now, having stated the principal facts which bear upon this case, that you may have sufficient knowledge to act in the premises, I write to ask if you will appoint some good man as a referee or arbitrator to whom this case may be referred, with power to hear the evidence and make an award which shall be accepted, whether for or against us, as a final settlement of this long and much-litigated case. Mr. Davis W. Bailey, who was an honest and good man, spent all that he had in this contract and in a vain attempt to recover what was due him from said District, and now for more than ten years his widow, Mrs. Elizabeth Bailey, who is the administratrix and plaintiff in this suit, has struggled with the vain hope that she would yet recover what was honestly and justly due her from said District. Mr. Davis W. Bailey was a captain in the United States service and served in said capacity during the entire war, and rendered great and valuable service in the defense of his country in the time of its sorest need; and now his widow and orphan child are asking that the country for whom he gave the best days of his life in its defense will pay them the honest and hard-earned money which was so justly due him. With the sincere hope that you will take immediate action to in some way right this old wrong, I remain,

Most respectfully,

W. PRESTON WILLIAMSON,
Att'y for Bailey."

Said Commissioners received and duly considered said letter, and thereafter, on the 11th day of January, in response to said letter, said Commissioners made and communicated to said W. Preston Williamson, as my attorney, an order of which the following is a copy:

"WASHINGTON, D. C., *January 11th*, 1892.

"Ordered that J. J. Johnson is hereby appointed referee in the matter of Bailey, administratrix of Davis W. Bailey, deceased, *versus* The District of Columbia."

Said John J. Johnson was selected by the District Commissioners and named in said order under no suggestion from me, and, as I am informed and believe and expect to prove at the trial of this case, without any suggestion from my said attorney or anybody else in my interest. Said Johnson, shortly after the date of said order, accepted said appointment, and soon thereafter entered upon the performance of his duties therein and gave due and proper notice to said Commissioners and to the attorney for the District of Columbia and to me, through my said attorney, that he would hear and consider any evidence or arguments that might be offered or made on behalf of either the District of Columbia or myself in the matters submitted to him; and thereafter, as I am informed and believe and expect to prove at the trial of this case, George C. Hazelton, the attorney for the District of Columbia,
13 with the knowledge and by the authority and direction of said Commissioners, and said W. Preston Williamson, as my attorney and at my request, appeared before said Johnson and respectfully submitted evidence in behalf of their respective clients to said Johnson, and thereafter informed said Johnson that their evidence was closed, and made arguments to said Johnson upon such evidence in behalf of the respective clients, and then announced to said Johnson that the evidence and arguments were closed, and that the case was submitted to him for determination under and by virtue of his said appointment. Said Johnson considered said evidence and arguments, and thereafter, on the 18th day of July, 1892, made his written report and award, in and by which he determined and declared that said District of Columbia should pay to me, as administratrix as aforesaid, the sum of $10,519.20, and said Johnson at the same time gave due notice of the making of his said determination and award to the said District of Columbia and to me.

Immediately thereafter, by my said attorney, I demanded of the District of Columbia and of the Commissioners of the District of Columbia for the time being that they should pay to me as administratrix as aforesaid said sum of money, but they have refused to pay the same or any part, and I claim to recover in the above-entitled suit from the District of Columbia said sum of $10,519.20, with interest from the 18th day of July, 1892, the whole of which sum and interest is due to me as administratrix as aforesaid from the District of Columbia, exclusive of all set-offs and just grounds of defense.

ELIZABETH L. W. BAILEY, *Adm'x.*

Subscribed and sworn to before me this 5th day of August, 1893.

J. R. YOUNG, *Clerk*,
By L. P. WILLIAMS, *Ass't Cl'k.*

Pleas and Affidavit of Defendant.

Filed September 2, 1893.

In the Supreme Court of the District of Columbia.

ELIZABETH L. W. BAILEY, Adm'x, etc., *vs.* DISTRICT OF COLUMBIA. } At Law. No. 34564.

An- now comes the defendant, by its attorneys, and for pleas says:

1. That the plaintiff and defendant did not agree to submit the said matters of difference to the award and arbitrament of the said John J. Johnson in manner and form as alleged.

2. That the said John J. Johnson did not make an award of and concerning the said matters of difference as alleged.

3. And for a further plea the defendant says that Davis
14 W. Bailey, the plaintiff's intestate, on February 24th, 1883, brought an action in the supreme court of the District of Columbia to recover $25,000 damages against the defendant for an alleged breach of contract for resurfacing with asphaltum certain streets and avenues in the city of Washington in the year 1879, being the same claim referred to in the first count of the plaintiff's declaration; that the defendant filed pleas to the said action and issue was joined thereon and the same was calendared for trial; that on the death of said Davis W. Bailey, June 19th, 1883, said action was revived in the name of his administratrix, the present plaintiff; that afterwards, on July 18th, 1892, without any order of court, as required *required* by its forty-seventh common-law rule, the said Johnson assumed without any authority of law to make and filed in the cause a report, in which he found $10,519.20 against the defendant and in favor of the plaintiff; that afterwards, on the — day of August, 1892, the defendants filed exceptions to the said report, which said exceptions are still pending and undisposed of in the said cause; that after the filing of said exceptions the plaintiff moved for judgment on said report, which motion is still pending and undisposed of; that said cause is numbered 24279 on the law side of this court, and reference to the same and the proceedings therein are hereby made part of this plea.

4. And for a further plea the defendant says that the alleged award was not under seal and was never delivered to the defendant.

5. And for a further plea the defendant says that it never undertook and promised in manner and form as alleged.

6. And for a further plea the defendant says it is not indebted as alleged.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Defendant.

DISTRICT OF COLUMBIA, *ss:*

We, John W. Ross, Myron M. Parker, and Chas. F. Powell, on oath say we are Commissioners of the District of Columbia, the defendant named in the foregoing entitled action; that the plaintiff's intestate, one Davis W. Bailey, filed a suit in the supreme court of the District of Columbia against said District to recover damages for an alleged breach of contract for asphalt paving in 1879, his action being numbered 24279 at law; that appropriate pleas were filed to said action by the defendant and issue was joined thereon and the cause calendered for trial, and the same is now upon the trial calendar pending and undisposed of in said court; that on or about the 18th day of July, 1892, one John J. Johnson, as we are informed and believe, assumed to make and file in said cause a report or finding, not "an award," as alleged, of $10,519.20 against the defendant and in favor of the plaintiff; that the alleged award was without authority of law and invalid, the said Johnson never having had any authority or jurisdiction to make the same; that the alleged award or finding was not under seal and was never de-
15 livered to the defendant; that afterwards the defendant, by its counsel, filed exceptions to said report of the said Johnson or his so-called award, which said said exceptions are still pending and undisposed of; that the alleged award was not made by the said Johnson under any rule of court and was not in accordance with the rules and practice of said court; that the alleged reference of said cause to the said Johnson, as we are informed and believe, was for the purpose of ascertaining and reporting to the court the facts in said case to be reviewed by the court as the basis for its judgment and was never, as we are informed and believe, referred to the said Johnson, as arbitrator, by any order of the court or consent of parties, nor did the said Johnson make or profess to make any award in the said cause, but only a report; that the said Davis W. Bailey was fully paid for all the work he ever did for the defendant and there was no breach of contract, as alleged by him, and that the alleged finding by the said Johnson of $10,519.20 against the defendant as aforesaid was based upon a misconception both of the law and the evidence submitted to him, as plainly appears from his report filed in the cause; that the said Johnson instead of reporting that the defendant owed the plaintiff, as administratrix of David W. Bailey, the sum of $10,519.20, he should have found that it owed her nothing; that there is or was no other cause pending or existing between the plaintiff or the plaintiff's intestate and the defendant except the said cause, numbered 24279, above mentioned; that the plaintiff is not entitled to recover in this action the whole or any part of the money claimed in her declaration.

JOHN W. ROSS.
MYRON M. PARKER.
CHARLES F. POWELL.

Subscribed and sworn to before me this first day of September, 1893.

[SEAL.] WILLIAM TINDALL,
Notary Public.

Joinder of Issue.

Filed October 8, 1895.

In the Supreme Court of the District of Columbia.

ELIZABETH L. W. BAILEY, Adm'x,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 34564.

The plaintiff joins issue on the defendant's pleas.

A. S. WORTHINGTON AND
W. PRESTON WILLIAMSON,
Att'ys for Plaintiff.

16

Order.

Supreme Court of the District of Columbia, October Term, 1895.

Proceedings before the supreme court of the District of Columbia, holding a circuit court (division number two) and special term in and for said District, commencing the first Tuesday, it being the 1st day, of October, A. D. 1895.

TUESDAY, *October 1st, A. D.* 1895.

By order of Honorable Louis E. McComas, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

TUESDAY, *October* 8, 1895.

Session resumed pursuant to adjournment, Mr. Justice McComas presiding.

* * * * * * *

ELIZABETH L. W. BAILEY, Adm'x, Pl'ff,
v.
THE DISTRICT OF COLUMBIA, Def't } At Law. No. 34564.

Now comes here the plaintiff, by her attorneys, Messrs. Worthington and Williamson, and moves the court to place this case upon the trial calendar and consolidate it with case of Bailey *v.* The District of Columbia for trial. After argument by the respective attorneys, it is considered that said motion be, and the same is hereby, granted, and the cause is ordered to be placed upon the calendar and to be consolidated with said above-mentioned case for trial at the same time and by the same jury. The attorney for the D. C. opposed the above motion.

Memoranda.

1896, January 10.—Verdict for plaintiff for $10,519.20, with interest from July 18, 1892.

" January 15.—Motion for new trial filed.

Order.

Supreme Court of the District of Columbia, January Term, 1896.

Proceedings before the supreme court of the District of Columbia, holding a circuit court, division number two, and special term in and for said District, commencing the first Tuesday, it being the 7th day, of January, A. D. 1896.

TUESDAY, *January 7th*, 1896.

By order of Honorable Louis E. McComas, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

17 WEDNESDAY, *January* 22, 1896.

Session resumed pursuant to adjournment, Mr. Justice McComas presiding.

* * * * * * *

ELIZABETH L. W. BAILEY, Administratrix of Estate of Davis W. Bailey, Dec'd, Pl'ff,
v.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 34564.

This case coming on to be heard upon the defendant's motion for new trial and the same having been heard, it is considered that said motion be, and the same is hereby, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiff recover against said defendant ten thousand five hundred and nineteen dollars and twenty cents ($10,519.20), with interest thereon from the 18th day of July, 1892, being the money payable to her by the defendant by reason of the premises, together with her costs of suit, to be taxed by the clerk, and have execution thereof.

Order for Appeal.

Filed January 25, 1896.

In the Supreme Court of the District of Columbia, the 25th Day of January, 1896.

BAILEY, Adm'x,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 34564, Cal. No. 789.

The clerk of said court will please enter an appeal to the Court of Appeals of the District of Columbia from the judgment this day entered in the above-entitled cause, and will please issue citation and make transcript of record for said Court of Appeals.

S. T. THOMAS,
Attorney for District of Columbia.

In the Supreme Court of the District of Columbia.

ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased,
vs.
THE DISTRICT OF COLUMBIA.
} At Law. No. 34564.

The President of the United States to Elizabeth L. W. Bailey, administratrix, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia, on the 25th day of January, 1896, wherein The
18 District of Columbia is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 25th day of January, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 29 day of January, 1896.

A. S. WORTHINGTON,
Attorney for Appellee,
Per W. R.

Memorandum.

1896, April 6.—The January term of the court prolonged 30 days to settle bill of exceptions.

Order.

Supreme Court of the District of Columbia, January Term, 1896.

Proceedings before the supreme court of the District of Columbia, holding a circuit court, division number two, and special term in and for said District, commencing the first Tuesday, it being the 7th day, of January, A. D. 1896.

TUESDAY, *January 7th*, 1896.

By order of Honorable Louis E. McComas, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

ELIZABETH L. W. BAILEY, Adm'x, Pl'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't.
} At Law. No. 24279 & 34564.

MAY 5.

Now again comes here the defendant, by its attorneys, and tenders to the court here its bill of exceptions taken during the trial of this case, and prays that it may be duly signed, sealed, and made a part of the record now for then, which is done accordingly.

19 *Bill of Exceptions.*

Filed May 5, 1896.

In the Supreme Court of the District of Columbia.

ELIZABETH L. W. BAILEY, Adm., etc.,
vs.
THE DISTRICT OF COLUMBIA.
} At Law. No. 24279 and 34564.

At the trial of this cause, which was had on the 9th day of January, A. D. 1896, before the Honorable Louis E. McComas, associate justice of the supreme court of the District of Columbia, and a jury, the plaintiff, to maintain and prove the issues on her part joined, gave evidence tending to show—

By WILLIAM PRESTON WILLIAMSON that he is a member of the bar of the supreme court of the District of Columbia and had been connected with this case as attorney for the plaintiff since 1888 or 1889; that as attorney for and under the authority of plaintiff he had some considerable talk with the Commissioners of the District of Columbia, and then, after consultation with plaintiff, wrote them a letter of which the following is a copy:

"WASHINGTON, D. C., *Sept. 16th*, 1891.

To the honorable Commissioners of the District of Columbia.

GENTLEMEN: I have the honor to call your attention to the case of Davis W. Bailey *vs.* District of Columbia, No. 24279 at law, now pending in the supreme court of said District. The grounds of said suit is for breach of contract, and the facts are as follows: On the 30th day of July, 1879, Davis W. Bailey was awarded contract No. 222. Said contract was for resurfacing certain streets and parts of streets with asphaltum within and for the District of Columbia; that Congress appropriated for this particular and special work the sum of $100,000, naming it as "repairs to concrete pavements." The contract covered about 65,000 yards at a price averaging about 95 cents to the square yard. After Bailey had completed about 30,000 yards of said contract he was notified of the rescinding of the unexecuted balance of said contract, as is shown by Commissioner Twining's letter of February 12, 1880. At this time Bailey had expended for machinery necessary to the execution of said contract $10,180; for stock on hand at date of cancellation

of said contract $7,000, which was almost total loss to said Bailey. In addition to this, the profit on the unexecuted balance of said contract, with the stock, fixtures, and appliances on hand for its execution, as shown by schedule, $8,000; also the amount due Bailey for one-half inch extra surface, not required by contract, $5,000; so by addition it will be seen by a glance that the amount due Bailey is $31,180. Now, the only defense which the District has been able to urge against this just and honest claim is, first, for the repairing of certain repairs on certain streets by said District the sum of $1,312.30, which is set up as a set-off, which the
20 plaintiff is not and could not be liable for, as he did not bind himself by his contract to keep these repairs in repair and in which he is fully sustained by the letter of the 1st Comptroller of the Treasury Department, dated July 22, 1882. The second objection urged by the District is that the appropriation made by Congress for this work had been exhausted. The plain *truth and facts are that the money appropriated by Congress for this particular work was illegally* and *unlawfully* diverted from its proper channel and expended for other purposes, to the great loss and damage of said Bailey, as he was ready, willing, and able to carry on his contract to completion when the fatal and disastrous letter from the Commissioners notifying him that he must stop work, as the appropriation for said work had been exhausted, reached him. This was erroneous, as it was afterwards discovered that there were several thousand dollars still on hand available for said work, but it was then too late to prevent the loss and damage to said Bailey, for *the large quantities of material* which were on hand at the yards of said Bailey were almost a total loss to him, as is set forth in E. J. Hamner's letter, hereto attached and marked Exhibit No. 1.

The third and last objection advanced by the District against the claim of said Bailey is that he delayed his work and did not complete it within the time specified in the contract. To that we answer that the delays were no fault of Bailey's, but were *wholly and solely* chargeable to the District of Columbia and its officers, for large quantities of extra work were piled upon Bailey which the *Commissioners admit* over their *own signatures* were not anticipated, but must be first done by Bailey before he could go on and complete his work under said contract.

Now, having stated the principle facts which bear upon this case that you may have sufficient knowledge to act in the premises, I write to ask if you will appoint some good man as a referee or arbitrator to whom this case may be referred, with power to hear the evidence and make an award which shall be accepted, whether for or against us, as a final settlement of this long and much-litigated case. Mr. Davis W. Bailey, who was an honest and good man, spent all that he had in this contract and in a vain attempt to recover what was due him from said District; and now, for more than ten years, his widow, Mrs. Elizabeth Bailey, who is the administratrix and plaintiff in this suit, has struggled with the vain hope that she would yet recover what was honestly and justly due her from said District. Mr. Davis W. Bailey was a captain in the United

States service and served in said capacity during the entire war, and rendered great and valuable service in the defense of his country in the time of its sorest need; and now his widow and orphan child are asking that the country for whom he gave the best of his life in its defense will pay them the honest and hard-earned money which was so justly due him.

With the sincere hope that you will take immediate action to in some way right this old wrong, I remain,

Most respectfully,

W. PRESTON WILLIAMSON,
Att'y for Bailey."

21 Which said letter was offered and read in evidence.

That after the receipt of this letter the Commissioners made the following order, which was offered and read in evidence:

"Office of the Commissioners of the District of Columbia.

WASHINGTON, *Jan.* 11, 1892.

Ordered that J. J. Johnson is hereby appointed referee in the matter of the suit of Bailey, administratrix of Bailey, deceased, *vs.* District of Columbia.

Official copy.

By order:

W. TINDALL, *Secretary.*"

That the Commissioners at the date of this order were John W. Douglass, John W. Ross, and William T. Rossell, but that he had no dealings with the last named; that between the time he wrote the letter of Sept. 16th, 1891, and the time of the order of Jan. 11, 1892, he had no written communications with the Commissioners, but that he had consultations with them.

Whereupon the attorney for the plaintiff asked the following question:

Q. Now, will you state what conversation you had with the Commissioners or either of them or with their attorney, General Hazelton, in reference to this matter of appointing a referee or arbitrator, as requested in your letter.

To which question, at the time the same was asked and before the witness' answer thereto was taken, the defendant, by its attorney, objected, because the whole matter of agreement between the parties was in writing and oral evidence was not admissible to explain or alter the writing; but the justice presiding overruled said objection and permitted an answer thereto to be taken as follows:

A. I had several conversations with the Commissioners. After the letter was written I saw Mr. Douglass and talked over the matter with him, and he said that, after informing him of what Mr. Ross had said to me, that he was glad that the matter could be disposed of by arbitration, and that if there was anything coming to Mrs. Bailey she ought to have it, and that some man might be selected who would at once arbitrate the matter and we might dispose of it.

I told him that Mr. Ross had finally agreed that this matter might be determined by arbitration, and that he would try to name the arbitrator, as I had left it exclusively and entirely to the Commissioners to name the person or persons who might arbitrate the case; that Mr. Ross had directed me to see Mr. Darlington and try to induce Mr. Darlington to act; that I had been to Mr. Darlington and saw him and talked the matter over with him, and he declined to act because he was very busy and could not take the position. It was then suggested by Mr. Ross that we had better see Mr. Shellabarger and have him, when I reported that he was sought,
22 and declined and refused, and Mr. Ross, I think, then suggested that Mr. J. J. Johnson would then be selected, and I say that Mr. Ross said this to me in talking over the matter. He said, Mr. Williamson, I want this to be final. I want this to be the end of this matter. I do not want Mrs. Bailey to come around this office or come after us any more. If these arbitrators or the arbitrator shall decide against her, I want that to be the end of it, and that the claim shall be disposed of. I, of course, assured him that my letter had stated that if it was against us we would except it, and if it was for us we would, of course, be glad, but that that would be our position, and I had one or two conversations with Mr. Ross in regard to the matter, and that was the burden of his conversation to me and mine to him, that this should be final and that Mrs. Bailey would not claim anything further or look for anything further if the award was against her.

To the ruling of the court in overruling the defendant's objection and permitting said question to be answered and answer thereto to be taken and to the answer itself the defendant, by its attorney, excepted, for the reasons stated in its objection, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict, and the defendant, by its counsel, requested the court to sign and seal this its first bill of exceptions, which is accordingly done, *nunc pro tunc*, this 5th day of May, 1896.

L. E. McCOMAS, *Justice.* [SEAL.]

After signing and sealing said first bill of exceptions, hereby made part of the record, which is made part hereof, the witness testified as follows:

That in these conversations both of the Commissioners, Mr. Douglas and Mr. Ross, understood from first to last that there was to be an end of the claim after that, whatever the result was, and that the arbitrator, whoever he might be, would settle finally the claim; that down to the passing of the order of reference nothing was ever said by either of the Commissioners inconsistent with the understanding that the decision of Mr. Johnson was to be final; that the attorney for the District took no part in these negotiations with him; that after the appointment a day was set for a hearing, and each party appeared before the arbitrator with witnesses, and each side was heard by examination and cross-examinations and by argument.

Whereupon the attorney for the plaintiff asked the following question:

"Q. Do you remember whether anything took place while you were before Mr. Johnson, when he was hearing this case, when you and General Hazelton were both present, in which anything was said as to whether Mr. Johnson was acting in this matter by way of making an award or only a report to the court?"

To which question, at the time the same was asked and before the witness' answer thereto was taken, the defendant, by its attorney, objected, because the testimony is inadmissible and incompe-
23 tent and because the only authority conferred on Mr. Johnson is contained in the order of reference, and it was not competent for the counsel or the referee to enlarge it; but the justice presiding overruled said objection and permitted an answer thereto to be taken as follows:

"A. When we met—that is, Mr. Johnson, who had been appointed as the arbitrator, and Col. Hazelton, representing the District, and myself, representing Mrs. Bailey—we talked over the matter as to what was to be done, and what should be done, and whether or not this was to be final, and Mr. Hazelton, representing the District, said that this was final and conclusive as to the whole matter, and Mr. Johnson said that he understood that was his appointment as an arbitrator, and that this was to wind up finally the whole matter, and the thing was again talked over at another point in this case, when some pleadings belonging in the case were absent and an amendment was necessary. Col. Hazelton said that his instructions from the Commissioners were that it was to be final."

To the ruling of the court in overruling the defendant's objection and permitting the question to be answered and the answer thereto to be taken and to the answer itself the defendant, by its attorney, — for the reasons stated in the objection, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict, and the defendant, by its counsel, requested the court to sign and seal this its second bill of exceptions, which is accordingly done, *nunc pro tunc*, this 5th day of May, 1896.

L. E. McCOMAS, *Justice.* [SEAL.]

After signing and sealing said second bill of exceptions, hereby made part of the record, which is made part hereof, the witness further testified:

From the time of his appearance before the arbitrator to the filing of his award nothing occurred to change the understanding between the parties; that after the case had progressed before the arbitrator for a while it was discovered that an amended declaration which had been agreed should be filed by Mr. Riddle while district attorney had not been filed; that Mr. Hazelton agreed to the filing of this amended declaration, which contained a claim for the extra half inch resurfacing omitted in the original declaration, and it was filed before the arbitrator; that nothing has been paid on the award excepting the referee's fee, which was paid by Mrs. Bailey.

Hereupon counsel for plaintiff offered in evidence the endorsements on the letter of Mr. Williamson to the Commissioners dated Sept. 16th, 1891, as follows:

"Office of the Commissioners of the District of Columbia, Sept. 17th, 1891. Respectfully referred to the auditor (word auditor erased and in pencil att'y) D. C. By order: W. Tindall, sec'y. No. 10691 F. Office auditor D. C., October 15, 1891.

Respectfully returned, at the suggestion of the writer, for
24 reference to the attorney D. C. J. F. Petty, auditor D. C.
Respectfully referred to the attorney D. C. By order: W. Tindall, sec'y.
Oct. 15, 1891.

Office att'y D. C., Oct. 17, 1891. This is a case which has been pending in the court for a long time and it ought to be disposed of. If it could be referred to some first-class referee, who will give us a full hearing, it would be a very good way of disposing of it and I should favor such a reference, as we can then attend to it at our convenience.

Respectfully, GEO. C. HAZELTON, *At'y D. C.*

(In pencil:) 'Ans. Mr. Douglass.' Comm'rs think this case should be settled in court."

Hereupon counsel for plaintiff offered in evidence the following letter:

"OFFICE OF THE ATTORNEY D. C.,
WASHINGTON, D. C., *October* 28, 1891.

To the Hon. Commissioners, etc., etc.

GENTLEMEN: I return to you herewith a communication from W. Preston Williamson, Esq., relative to the case of Bailey *vs.* The District of Columbia, referred to me with the request that I give you the name of some one who would make a good referee.

I would suggest either Mr. A. B. Duvall or Mr. J. H. Lichliter, both members of the bar and well qualified to decide the issues in that case.

Very respectfully, S. T. THOMAS,
Ass't Att'y D. C."

Also the following memorandum:

"THOMAS: Think of some good names for a referee and talk with us about this case.

Oct. 27, 1891." J. W. D.

The plaintiff, to further maintain the issues on her part joined, offered as a witness GEORGE C. HAZELTON, who gave testimony tending to show that he was the attorney for the District of Columbia in 1891 and 1892; that the proposition to arbitrate the case of Bailey *v.* District was initiated by Mr. Williamson by addressing a letter to the Commissioners; that after the preliminary matters

were arranged he was sent for by the Commissioners to come down and talk the matter over, and Mr. Ross said, We have agreed to it, and the witness said if the case was to be taken out of court and submitted to an arbitrator that ought to be the end of it; that the very purpose of taking it out of the court and going into an arbitration was to end it out finally, and if the District was beaten they must submit, and if Mrs. Bailey was beaten she must submit; that this was clearly understood by Mr. Ross, Mr. Douglass, and himself; that Mr. Ross had several names before him, but he finally said, Well, Mr. Johnson is an old commissioner of the court, and he was
25 willing to take him, and so he was agreed upon; that the signature to the endorsement of Oct. 17, 1891, was written by witness; that Capt. Rossell was the Engineer Commissioner at that time and was present when the conversation was had with Mr. Ross and acquiesced, although, being Engineer Commissioner, such matters were generally left to the other two Commissioners; that the order appointing Mr. Johnson as arbitrator failed to state that it was to be a finality, and the question came up before the referee as to his powers, and witness told him that that was left out by inadvertence; that it was the clear understanding that he was to arbitrate the case finally and close it out.

To all the testimony of this witness counsel for the defendants objected before the same was given because immaterial and incompetent, and because all the authority conferred upon Mr. Johnson by the order of reference was contained in said order of reference, and because the Commissioners were without authority to appoint an arbitrator to finally dispose of said cause and render and award therein; but the justice presiding overruled said objection and permitted said evidence to be given.

To the ruling of the court in overruling the defendant's objection and permitting said evidence to be given and to the testimony itself the defendant, by its attorney, excepted because of the reasons stated in the objection, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict, and the defendant, by its counsel, requested the court to sign and seal this its third bill of exception, which is accordingly done, *nunc pro tunc*, this 5th day of May, 1896.

L. E. McCOMAS, *Justice.* [SEAL.]

After signing and sealing said third bill of exception, hereby made part hereof, the witness further testified:

That as attorney of the District he was fully heard on the law and evidence in the case; that between the time the referee was appointed and the time he made his report nothing, to his knowledge, took place to change the arrangement which had been entered into between the Commissioners and Mrs. Bailey's representative that the finding should be final.

The plaintiff, to further maintain the issues on her part joined, offered as a witness JOHN J. JOHNSON, who gave evidence tending to show that he was the referee appointed in this case and made the

report herein filed; that at the time he received the order of his appointment he answered it, accepting the appointment; whereupon the attorney for the plaintiff asked the following question:

"Q. After you received this order and had accepted it, did anything take place between the attorneys of the respective parties in your presence in relation to the nature of your duty—I mean as to the effect that was to be given to your findings?"

To which question, at the time it was asked and before the witness' answer thereto was taken, the defendant, by its attorney,
26 objected because the same is immeterial and incompetent, and because the written order of reference could not be altered or explained, and because the Commissioners were without authority to submit the case to arbitration; but the justice presiding overruled said objection and permitted an answer thereto to be taken as follows:

A. I set some day to hear this case at Mr. Hazelton's office, across the way here, and when I reached his office the court papers were all there. I looked over the appointment of the Commissioners to me as referee, and I then said that that may have been inadvertently left out—as to whether it was to be final or not—and I wanted to understand whether it was to be final or not. Then, before we proceeded to hear the case at all, Mr. Hazelton, representing the District, and Mr. Williamson the administrator were all present, and Mr. Hazelton said this was to be a final determination of this case. Mr. Williamson also had raised the question and he wanted it understood.

To the ruling of the court in overruling the defendant's objection and permitting said evidence to be given and to the testimony itself the defendant, by its attorney, excepted because of the reasons stated in the objection, and the exception was noted by the justice presiding on his minutes before the jury retired to consider of their verdict; and the defendant, by its counsel, requested the court to sign and seal this its fourth bill of exceptions, which is accordingly done, *nunc pro tunc*, this 5th day of May, 1896.

L. E. McCOMAS, *Justice.* [SEAL.]

After signing and sealing said fourth bill of exceptions, hereby made part hereof, the witness further testified:

That he heard the parties on both sides fully, who put in such testimony as they had; that he filed the report in this case and returned all the court papers with it to the clerk of the court, and the papers from the District office were all gathered up and handed to Mr. Richardson, who returned them to the Commissioners' files; that the amended declaration, in addition to the claim of the original declaration, was for the extra one-half inch in thickness of the asphalt pavement referred to in the original declaration; that the amount claimed in the amended declaration on this account was six or seven thousand dollars; that this amended declaration was filed by consent of the attorney for the District, that having been the understanding with Mr. Riddle, and, although he filed it in court with the other papers, he has been unable to find it after a

thorough search recently made; that he had no direct communication with the Commissioners other than the order of reference and his reply of acceptance.

On cross-examination the witness said that he has been referee in a great number of cases and invariably returned the tesimony into court; that he endorsed the paper, "Referee's report. The clerk will please file this report. J. J. Johnson, referee," because it was a case in court, sent out of court by agreement of the parties to
27 him, and he sent it to the court from whence it came, and that he did this of his own motion, without consultation with or authority from either of the parties; that he could not send it to the Commissioners; that he was not to make the report to the plaintiff, but to make it to both parties, and, the case being in court, he thought that the best place to file it; that his duties ended when he filed this report; that the testimony filed with the report was not filed as a part of the report, because all the testimony is not there; that he returned to the District office all their papers; that the return with the report is only the testimony of some of the witnesses that were produced before, and the letter of Captain Greene is not there, but was in evidence before him; that the testimony returned with the report is the stenographer's report of the oral evidence taken before him. The testimony was not read over to the witnesses, but was simply taken for his guidance.

Hereupon counsel for plaintiff offered in evidence, in case No. 34564, the report or award of Mr. Johnson, as follows:

Referee's Report.

Filed July 18, 1892. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

DAVIS W. BAILEY
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 24279.

Pleadings.

On the 24th day of February, 1883, the plaintiff brought his action at law against the defendant upon a covenant in a contract entered into between the plaintiff and the defendant, wherein it was agreed that the plaintiff should resurface with asphaltum wearing surface the bituminous pavement upon certain streets therein named. The defendant covenanted to pay the plaintiff the prices therein stated, and plaintiff further avers that, at great cost and expense for his plant, material, and labor, he was performing and carrying out his part of said contract in a proper manner and without any unnecessary delay when he was forbidden by the defendant to proceed further with said resurfacing under the contract, and that the defendant has refused to pay him the sum of money cov-

enanted to pay the plaintiff, and, although the defendant has been requested to do so, has not kept said covenant, but has broken the same and to keep the same with the plaintiff has hitherto wholly neglected and refused, and still neglects and refuses to keep the same, to the damage of the plaintiff in the sum of $25,000.

The defendant pleaded, denying the breaches of the covenant; that the defendant performed all of the covenants of the contract declared on, and that after the plaintiff had performed a large portion of the work called for under the contract the Commissioners
28 ascertained that the appropriation for repairs of streets was exhausted, and notified the defendant he would not be permitted to go on and complete the work then unfinished, and that the plaintiff was to have completed the entire contract in one hundred and twenty days. To the pleas the plaintiff replied that after the expiration of one hundred and twenty days the defendant urged the plaintiff to go on and complete the work, and, being so urged, he did complete a portion of it, and was proceeding without unnecessary delay to complete the whole of it when he was ordered not to complete a certain portion of the work then not completed.

A long time after filing of the declaration and pleas the declaration was amended so as to permit the plaintiff to claim and sue for the increased thickness of surface and asphaltum not included in the contract; also for losses sustained by changing of the contract, requiring streets to be cut down or cut out, work not contracted for.

This contains in brief the pleadings.

The Plaintiff's Claim.

1. For damages by reason of being prevented from completing his contract by the defendant.
2. To one-half inch of extra surface which was not required by the contract.
3. The profits on the balance of the unexecuted contract.
4. For loss of material and machinery on hand at the time the defendant stopped the work.

Statement of the Facts.

On the 30th of July, 1879, the defendant awarded a contract (No. 222) to D. W. Bailey, agent for the Bailey-French Paving Company, for resurfacing certain streets in said contract named. The estimated amount of work to be done under said contract was 45,537 square yards, in which the contract price varies with different streets from eighty-two to one dollar and five cents per square yard, amounting to the sum of $40,950.86; that the conditions of the contract required the contractor to do any extra work that may be ordered by the Engineer Commissioner arising out of any modification of the plans or details that may appear necessary and for this work of a similar character. In the opinion of the Engineer Commissioner, such a change became necessary. Originally it was intended to stop the resurfacing within about two feet of

the gutter, leaving a beveled edge, so that between the bevel edge and the curb the old pavement was not to be touched; that when the old pavement showed a sufficient amount of curb to take the new pavement, it was intended to lay the new pavement up to the curb. It turned out as a fact that in very few cases there was enough showing of the curb to admit a new pavement, and therefore the proposed beveled edge would not be durable. Thereupon another plan was adopted, and the contract in that respect was
29 changed and the contractor notified of the change, which was to cut out the old pavement for a sufficient width from the curb—excavate a certain — of earth under it—so as to lower the grade, and then lay an entirely new pavement in the gutter; that the plaintiff, under protest, was compelled by the order of the Engineer Commissioners to make the resurfacing of the streets one-half of one inch in thickness more than the contract called for, the contract being for two and one-half inches, and that the plaintiff has never been paid for the extra one-half inch; that on the 12th of February, 1880, the defendant notified the plaintiff in writing that so much of the contract as applied to Mount Vernon Avenue square, from 7th to 9th streets west, and Pennsylvania avenue from 6th to 8th streets east was revoked on the grounds that the Commissioner had no funds to pay for those streets; that when the plaintiff was stopped from proceeding further with the execution of the contract he had executed 34,152 square yards, about three-fourth- of the entire work estimated under the contract; that the plaintiff was paid for the extra work caused by the change of the contract $5,748.14, and on the estimated work under the contract completed up to the date when plaintiff was stopped from doing any further work by the defendant he has been paid $30,210.50, being for the work done to the time when the work was suspended, leaving the unexecuted balance of the estimated work under the contract eleven thousand three hundred and eighty five square yards; that the plaintiff at the time of the stoppage of the work was able and ready with materials and machinery of kettles for refining asphalt, kettles for drying in oil tanks, engine, boiler, mixer, rotary sand-dryer, iron and stone rollers, worth about $10,000; that the machinery was disposed of at a loss of $5,000, and the material on hand, valued at about $6,000 to $7,000, was a loss.

This is the testimony in the case.

Findings of the Referee.

This was an action of covenant, commenced in this court on the 24th of February, 1883. The case was this: On the 30th of July, 1879, a contract under seal was entered into between the Commissioners for the District of Columbia and the plaintiff, by which the latter covenanted to furnish all necessary materials and labor and in good, firm, and substantial manner execute the work on the streets named in said contract. The defendant covenanted to pay the prices specifically stated therein. The plaintiff proved that he commenced the work in pursuance of the covenant between him

and the defendant, and continued so to perform the work until the 12th of February, 1880, when the defendant suspended all operations of the work upon the streets named without any fault on the part of plaintiff, but for want of funds, and refused to permit the plaintiff to proceed further with the work under the contract, though the plaintiff was ready and willing and offered to perform the work to its completion. At the time the work was suspended the plaintiff had under his contract resurfaced 34,152 square yards, for which he has been paid, leaving unexecuted balance of the estimated work eleven thousand three hundred and eighty-five square yards. It is further proved that the plaintiff did, under protest, but by direction of the Engineer Commissioner, resurface the said streets to the thickness of three inches of asphaltum instead of two and one-half inches as contracted; that under the contract the plaintiff, for resurfacing the streets, was to receive eighty-nine cents and a fraction per square yard, which would cost about fifty cents per square yard to resurface. The plaintiff produced some evidence tending to show, *that* at the time he was prevented from going on and completing the contract, the value of the machinery and materials and the unavoidable losses incident thereby, but from such evidence it does not appear to what extent the losses were or the value of the materials or machinery. The rule of law requires the best evidence, which would have been the bills of prices of the machinery and material or the evidence of persons having such knowledge. It is undoubtedly true that a party to a contract who is without fault, and the other party during the progress of the work put an end to the contract before completion, he is entitled to recover for his losses sustained and his profits prevented by the action of the employer, and he may recover by bringing his action on the contract, and in such an action he is entitled to recover the contract price for work actually done and, in the absence of other damages, the difference between the contract price and what it would cost to perform the contract as to the residue.

By the wrongful act of another party the loss of the — is a direct and natural result, which the law will presume to follow the breach of the contract, and the contractor is entitled to recover it without special allegations in his declaration. In this case the contractor was doing the work under the contract, and during the progress of the work and without any fault on the part of the contractor the defendant put an end to the contract before the work was completed. The contractor is therefore entitled to be indemnified for losses sustained, as well as his profits prevented by the action of the defendant.

From the evidence it does not appear satisfactory to me the amount of the losses sustained by the plaintiff incident to the stoppage of the contract; therefore I cannot allow the plaintiff for unavoidable losses, either for material or for machinery. This leaves his extra half inch of asphaltum surfacing work done as aforesaid and the profits that he would have realized if he had been allowed to have completed the work under contract.

Upon the evidence and the law I have allowed the plaintiff for the unexecuted balance of 11,385 square yards $4,440.15, being the

profit between the cost of resurfacing the streets at fifty cents per square yard and eighty-nine cents, the price received, and for the extra one-half inch I have allowed the plaintiff $6,079.05 at the contract price, aggregating the sum of $10,519.20. I do therefore find that there is due to the plaintiff from the defendant the sum of $10,519.20, besides costs.

31 The following authorities sustain the conclusions of this finding by the referee:

Myers *v.* The N. Y. & Cumberland R. R. Co., Curtis C. C. R., 28.
Devlin *v.* Mayor, 63 N. Y., 8.
U. S. *v.* Speed, 8 Wall., 77.
Masterton *v.* Brooklyn, 7 Hill, 71.
Phila. R. R. Co. *v.* Howard, 13 Howard, 344.
Hale *v.* Clagett, 2 Md. Ch., 151.
Black *v.* Woodrow, 39 Md., 194.
Orange R. R. Co. *v.* Placide, 35 Md., 315.
Rittenhouse *v.* Mayor, 25 Md., 336.
U. S. *v.* Behan, 110 U. S., 338.

Referee's costs, $550.00.

J. J. JOHNSON.

To which offer, at the time it was made and before the same was given in evidence, counsel for the defendant objected on the ground that the whole report and such papers and evidence as appeared attached thereto should be offered with it, if offered at all, and because said referee was without authority to make an award; but the justice presiding overruled said objection and permitted said report to be given in evidence.

To the ruling of the court in overruling the defendant's objection to the said offer and the report itself the defendant, by its attorney, excepted, because of the reason stated in the objection, and the exception was noted by the justice presiding on the minutes before the jury retired to consider of their verdict, and the defendant, by its counsel, requested the court to sign and seal this its fifth bill of exceptions, which is accordingly done, *nunc pro tunc*, this 5th day of May, 1896.

L. E. McCOMAS, *Justice.* [SEAL.]

After signing and sealing said bill of exceptions, hereby made part hereof, the plaintiff, to further maintain the issues on her part joined, offered as a witness JOHN W. DOUGLASS, who gave evidence tending to show that he was one of the Commissioners of the District of Columbia in 1891 and 1892; that he has recollection as to this matter; that it was an old case pending in the courts and he was anxious to dispose of it; that documents are lost and witnesses die; that Mr. Ross and Mr. Hazelton wanted to try it in court in the first instance; that the reply to Mr. Williamson's letter was intended to be responsive to it; that the reference was intended to be final, or they would have made some qualification in their answer; that Mr. Hazelton at the time was fully informed as to his views

and the views of Mr. Ross; that from the time of the reference until the award nothing occurred, as far as he knows, to change the understanding as to the effect of the award; that his conversation with Mr. Williamson about the time of the reference was pretty
32 full, and that he remembers after Mr. Williamson had seen Mr. Ross he reported the conversation that he had with Mr. Ross to witness; that he then acquiesced at once.

To further maintain the issues on her part joined the plaintiff, ELIZABETH W. BAILEY, was sworn in her own behalf, and gave testimony tending to show that she is the present plaintiff in this case and is the widow of Davis W. Bailey, who was the original plaintiff; that the letter written to the Commissioners by Mr. Williamson agreeing to submit the case to arbitration was seen and approved by her before it was sent, and that nothing had ever been paid to her on account of the award.

Here the plaintiff rested. And the defendant, to maintain the issues on its part joined, offered as witness JOHN W. ROSS, who gave evidence tending to show that he is now, and has been since the fall of 1890, a Commissioner of the District of Columbia; that he is a member of the bar, and is acquainted with Mr. Williamson and this case; that he remembers distinctly that Mr. Williamson came to his room in the District building and discussed this matter with him to a certain extent; that he (Williamson) wanted the Commissioners to submit the cause in court to arbitration, and witness would not agree to that; that it was his impression that Williamson told him that the case was on the calendar and would not be reached for quite a long time, and the plaintiff was in need; that he said to Williamson whatever facts he wanted to prove could be presented to the Board of Commissioners and he had better put them in writing and let the Commissioners pass upon them; that it appears that thereafter Williamson wrote a letter to the Commissioners, which bore date September 16th, 1891. This letter, after having gone to the auditor by mistake, was referred to the attorney for the District October 15, 1891, and he reported thereon on the 15th of October; that his best recollection is that the Board of Commissioners by formal vote declined the proposition to arbitrate the case, and that is confirmed in witness' mind by the memorandum made on the papers; that he cannot recall with any definiteness any special interview thereafter, but he remembers that Mr. Williamson came to see the Commissioners quite often about the matter, and that was the year when they were pretty busy with the garbage contractor; that he cannot state any definite meeting when this matter was acted upon after this, but witness is confident that the Commissioners or a majority of them refused this offer to arbitrate; that witness understood the difference between an arbitration and an order of reference for a report; that he did not suggest the name of Mr. Johnson, his choice being Mr. Darlington for referee; that he understood the order to be one of the reference, and that no action — taken by the board in the line of arbitration; that Mr.

Douglass, Captain Rossell, and himself were the Commissioners at that time; that he does not remember having any consultation with Mr. Hazelton about the case.

On cross-examination the witness said: That there is no record of the appointment of the referee, except the one in evidence,
33 unless the pencil memorandum can be taken as a record; that he did not remember ever to have seen Mrs. Bailey, but he remembers having a conversation with Mr. Williamson, her attorney, shortly before the letter of Mr. Williamson was written; that he did not say to Mr. Williamson then that if this matter was referred he wanted it to be understood that it was to be a finality, and that he did not want Mr. Williamson or Mrs. Bailey coming around there any more; that there was no reason why he should want it to be a finality on the part of the District; that he wanted Mr. Williamson to put his request in the shape of a letter, as that is the only way in which they can deal with such matters; that the letter in evidence was the letter written after he made that suggestion; that he does not remember suggesting the name of Mr. Johnson or Mr. Shellabarger: that Mr. Duvall's name was spoken of; the Commissioners regard him favorably; that his recollection is that when the order was made appointing Mr. Johnson that Mr. Johnson was to hear the testimony and was to make a report to the court of the facts, and that the court was to pass on the reference, and his report was to be the subject of review by the court on exceptions or otherwise; that he does not believe that he ever told Mr. Hazelton to take the case out of court and end it by arbitration.

Hereupon defendant's counsel offered in evidence in case No. 34564 the record and proceedings in the case of Bailey *v.* The District, at law, No.24279, in this court, including the evidence attached to the report of the referee as well as the report itself; the exceptions by the defendant to the report of the referee, and the plaintiff's motions to confirm the report, and in making such offer counsel stated, respectively, as follows:

Mr. THOMAS: We offer in the second case the record in the first.

Mr. WORTHINGTON: What do you mean by the record?

Mr. THOMAS: The entire files in the first case—the declaration, pleas, and everything else.

Mr. WORTHINGTON: I want to understand you.

Mr. THOMAS: The report of Mr. Johnson, the exceptions to the report, and the motions to confirm the report.

Said papers (with the exception of the testimony appended to the report of the referee, as to which see " note ") are as follows:

Declaration, &c.

Filed February 24, 1883. R. J. Meigs, Jr.

In the Supreme Court of the District of Columbia, the 24th Day of February, 1883.

DAVIS W. BAILEY
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 24279.

The plaintiff sues the defendant for that heretofore, to wit, on the 30th day of July, 1879, at the city of Washington, in the
34 District of Columbia, by certain articles of agreement then and there made, concluded, and agreed upon between the plaintiff by the name and style of Bailey-French Paving Company, by D. W. Bailey, general agent, of the one part, and the defendant, of the other part. One original of said articles of agreement, sealed with the seals of Seth L. Phelps, Josiah Dent, and William J. Twining, as the then Commissioners of the District of Columbria, is now in the possession of the present Commissioners of said District, and the other original of said articles that was given to this — he placed in the hands of the First Comptroller of the United States Treasury and has been unable to obtain a return of the same.

In said articles it was covenanted and agreed that the plaintiff should resurface with asphaltum wearing surface the bituminous pavement upon certain streets and parts of streets in the city of Washington aforesaid, named and specified in said articles of agreement, and the defendant covenanted with the plaintiff to pay him in consideration therefor certain sums of money named in said articles of agreement; and the plaintiff, at great cost and expense for plant, material, and labor, proceeded to carry out his part of said agreement and was carrying it out without any unnecessary delay and in a proper manner when he was forbidden by said Twining to proceed further with said resurfacing, and said order of said Twining was ratified and enforced by the said Commissioners, Phelps, Dent, and Twining, and the defendant refused to pay the plaintiff the sum it had covenanted to pay him by said articles of agreement, although often requested so to do.

And so the plaintiff in fact says that said defendant, although often requested so to do, has not kept said covenant so by it made as aforesaid, but has broken the same, and to keep the same with the plaintiff has hitherto wholly neglected and refused and still neglects and refuses to keep the same, to the damage of the plaintiff of twenty-five thousand dollars.

And the plaintiff claims twenty-five thousand dollars, besides costs of suit.

O. D. BARRETT,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service; otherwise judgment.

O. D. BARRETT,
Attorney for Plaintiff.

Memorandum.

Defendant's pleas, filed April 4, 1883, missing from the files.

35 *Motion for Judgment.*

Filed September 12, 1892. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

ELIZABETH S. W. BAILEY, Adm'x of the Estate of Davis W. Bailey,
vs.
DISTRICT OF COLUMBIA.
} At Law. No. 24279.

Now comes the above-named plaintiff, by her attorney, and moves the court for judgment in the above-entitled cause.

W. PRESTON WILLIAMSON,
Attorney for Plaintiff.

To George C. Hazelton, Esq, attorney for the District of Columbia:

You will please take notice that I shall call up the above motion for hearing on Wednesday, 14th day of September, 1892, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

W. PRESTON WILLIAMSON,
Att'y for Plaintiff.

Exceptions to Report of Auditor.

Filed September 23, 1892. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Circuit Court for said District.

ELIZABETH S. W. BAILEY, Adm'x of the Estate of Davis W. Bailey, Deceased,
vs
THE DISTRICT OF COLUMBIA.
} At Law. No. 24279.

And now comes the defendant, The District of Columbia, and by its attorneys excepts to the report of the arbitrator, John J. Johnson, filed on the 18th day of July, 1892, in the above-entitled cause, and for exceptions says:

1. That the award is contrary to the evidence.
2. That the award is excessive.

3. That the evidence was insufficient to support the award.
4. Because of plain and palpable errors of law apparent on the face of the award.

GEORGE C. HAZELTON,
S. T. THOMAS,
Attorneys for the District of Columbia.

I consent that these exceptions be filed *nunc pro tunc.*
W. PRESTON WILLIAMSON,
Attorney for the Plaintiff.

36 *Motion for Judgment on Award.*

Filed March 10, 1893. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

DAVIS W. BAILEY
vs.
THE DISTRICT OF COLUMBIA. } No. 24279. At Law.

The plaintiff moves the court to confirm the award of the arbitrator, J. J. Johnson, heretofore filed in this case, and to enter judgment thereon for the plaintiff with interest from the date of the award and with costs of suit.

A. S. WORTHINGTON,
Attorney for Plaintiff.

To Hon. George C. Hazelton, attorney for the defendant:

Please take notice that I shall call up the above motion on Saturday, March 11, at the opening of the court or — soon thereafter as counsel can be heard.

A. S. WORTHINGTON,
Attorney for Plaintiff.

Service of copy of the foregoing motion and notice acknowledged this ninth day of March, 1893, and I hereby waive service of a copy of the award.

GEORGE C. HAZELTON,
Att'y D. C.

Referee's Report.

Filed July 18, 1892. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

DAVIS W. BAILEY
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 24279.

Pleadings.

On the 24th of February, 1883, the plaintiff brought his action at law against the defendant upon a covenant in a contract entered

into between the plaintiff and the defendant, wherein it was agreed that the plaintiff should resurface with asphaltum wearing surface the bituminous pavement upon certain streets therein named; the defendant covenanted to pay the plaintiff the prices therein stated; and plaintiff further avers that at great cost and expense for his plant, material, and labor he was performing and carrying
37 out his part of said contract in a proper manner and without any unnecessary delay when he was forbidden by the defendant to proceed further with said resurfacing under the contract, and that the defendant has refused to pay him the sum of money covenanted to pay the plaintiff, and, although the defendant has been requested to do so, has not kept said covenant, but has broken the same, and to keep the same with the plaintiff has hitherto wholly neglected and refused and still neglects and refuses to keep the same, to the damage of the plaintiff in the sum of $25,000.

The defendant pleaded, denying the breaches of the covenant; that the defendant performed all of the covenants of the contract declared on, and that after the plaintiff had performed a large portion of the work called for under the contract the Commissioners ascertained that the appropriation for repairs of streets was exhausted, and notified the defendant he would not be permitted to go on and complete the work then unfinished, and that the plaintiff was to have completed the entire contract in one hundred and twenty days. To the pleas the plaintiff replied that after the expiration of one hundred and twenty days the defendant urged the plaintiff to go on and complete the work, and, being so urged, he did complete a portion of it, and was proceeding without unnecessary delay to complete the whole of it when he was ordered not to complete a certain portion of the work then not completed.

A long time after filing of the declaration and pleas the declaration was amended so as to permit the plaintiff to claim and sue for the increased thickness of surface of asphaltum not included in the contract; also for losses sustained by changing of the contract, requiring streets to be cut down or cut out, work not contracted for.

This contains in brief the pleadings.

The Plaintiff's Claim.

1. For damages by reason of being prevented from completing his contract by the defendant.
2. To one-half inch of extra surface which was not required by the contract.
3. The profits on the balance of the unexecuted contract.
4. For loss of material and machinery on hand at the time the defendant stopped the work.

Statement of the Facts.

On the 30th of July, 1879, the defendant awarded a contract (No. 222) to D. W. Bailey, agent for the Bailey-French Paving Com-

pany, for resurfacing certain streets in said contract named. The estimated amount of work to be done under said contract was 45,537 square yards, in which the contract price varies with different streets from eighty-two to one dollar and five cents per square yard, amounting to the sum of $40,950.86; that the conditions
38 of the contract required the contractor to do any extra work that may be ordered by the Engineer Commissioner arising out of any modification of the plans or details that may appear necessary, and for this work the contractor was to be paid at the contract rates for work of a similar character. In the opinion of the Engineer Commissioner, such a change became necessary. Originally it was intended to stop the resurfacing within about two feet of the gutter, leaving a beveled edge, so that between the beveled edge and the curb the old pavement was not to be touched; that when the old pavement showed a sufficient amount of curb to take the new pavement it was intended to lay the new pavement up to the curb. It turned out as a fact that in very few cases there was enough showing of the curb to admit a new pavement, and therefore the proposed beveled edge would not be durable. Thereupon another plan was adopted, and the contract in that respect was changed and the contractor notified of the change by the Engineer Commissioner and to execute the work accordingly; that the contractor did execute the work as changed, which was to cut out the old pavement for a sufficient width from the curb, excavate a certain amount of earth under it, so as to lower the grade, and then lay an entirely new pavement in the gutter; that the plaintiff, under protest, was compelled by the order of the Engineer Commissioner to make the resurfacing of the streets one-half of one inch in thickness more than the contract called for, the contract being for two and one-half inches, and that the plaintiff has never been paid for the extra one-half inch; that on the 12th of February, 1880, the defendant notified the plaintiff, in writing, that so much of the contract as applied to Mount Vernon Avenue square, from 7th — streets west, and Pennsylvania avenue from 6th to 8th streets east was revoked on the grounds that the Commissioner- had no funds to pay for those streets; that when the plaintiff was stopped from proceeding further with the execution of the contract he had executed 34,152 square yards, about three-fourth- of the entire work estimated under the contract; that the plaintiff was paid for the extra work caused by the change of the contract $5,748.14, and on the estimated work under the contract completed up to the date when plaintiff was stopped from doing any further work by the defendant he has been paid $30,210.50, being for the work done to the time when the work was suspended, leaving the unexecuted balance of the estimated work under the contract eleven thousand three hundred and eighty-five square yards; that the plaintiff at the time of the stoppage of the work was able and ready with materials and machinery to have completed the entire work under the contract, consisting of kettles for refining asphalt, kettles for drying in oil tanks, engine, boiler mixer, rotary sand-dryer, iron and stone rollers, worth about $10,000

that the machinery was disposed of at a loss of about $5,000, and the material on hand, valued at about $6,000 to $7,000, was a loss.

This is the testimony in the case.

39 *Findings of the Referee.*

This was an action of covenant, commenced in this court on the 24th of February, 1893. The case was this: On the 30th of July, 1879, a contract, under seal, was entered into between the Commissioners for the District of Columbia and the plaintiff, by which the latter covenanted to furnish all necessary materials and labor and in good, firm, and substantial manner execute the work on the streets named in said contract. The defendant covenanted to pay the prices specifically stated therein. The plaintiff proved that he commenced the work in pursuance of the covenant between him and the defendant and continued so to perform the work until the 12th of February, 1880, when the defendant suspended all operations of the work upon the streets named without any fault on the part of plaintiff, but for want of funds, and refused to permit the plaintiff to proceed further with work under the contract, though the plaintiff was ready and willing and offered to perform the work to its completion. At the time the work was suspended the plaintiff had under his contract resurfaced 34,152 square yards, for which he has been paid, leaving unexecuted balance of the estimated work eleven thousand three hundred and eighty-five square yards. It is further proved that the plaintiff did, under protest, but by direction of the Engineer Commissioner, resurface the said streets to the thickness of three inches of asphaltum instead of two and one-half inches, as contracted; that under the contract the plaintiff, for resurfacing the streets, was to receive eighty-nine cents and a fraction per square yard, which would cost about fifty cents per square yard to resurface. The plaintiff produced some evidence tending to show *that* at the time he was prevented from going on and completing the contract the value of the machinery and materials and the unavoidable losses incident thereby, but from such evidence it does not appear to what extent the losses were or the value of the materials and machinery. The rule of law requires the best evidence, which would have been the bills of prices for the machinery and material or the evidence of persons having such knowledge. It is undoubtedly true that a party to a contract who is without fault and the other party during the progress of the work puts an end to the contract before completion, he is entitled to recover for his losses sustained and his profits prevented by the action of the employer, and he may recover by bringing his action on the contract, and in such an action he is entitled to recover the contract price for work actually done and, in the absence of other damages, the difference between the contract price and what it would cost to perform the contract, as to the residue.

By the wrongful act of another party the loss of the profits is a direct and natural result which the law will presume to follow the breach of the contract, and the contractor is entitled to recover it

without special allegations in his declaration. In this case the contractor was doing the work under the contract, and during the progress of the work, and without any fault on the part of the
40 contractor, the defendant put an end to the contract before the work was completed. The contractor is therefore entitled to be indemnified for losses sustained as well as his profits prevented by the action of the defendant.

From the evidence it does not appear satisfactory to me the amount of the losses sustained by the plaintiff incident to the stoppage of the contract; therefore I cannot allow the plaintiff for unavoidable losses, either for material or machinery. This leaves his extra half inch of asphaltum surfacing work done as aforesaid and the profits that he would have realized if he had been allowed to have completed the work under the contract.

Upon the evidence and the law I have allowed the plaintiff, for the unexecuted balance of 11,385 square yards, $4,440.15, being the profit between the cost of resurfacing the streets at fifty cents per square yard and eighty-nine cents, the price received, and for the extra one-half inch I have allowed the plaintiff $6,079.05, at the contract price, aggregating the sum of $10,519.20. I do therefore find that there is due to the plaintiff from the defendant the sum of $10,519.20, besides costs. The following authorities sustain the conclusions of this finding by the referee:

Myers *v.* The N. Y. & Cumberland R. R. Co., 2 Curtis C. C. R., 28.
Devlin *v.* Mayor, 63 N. Y., 8.
U. S. *v.* Speed, 8 Wall., 77.
Masterton *v.* Brooklyn, 7 Hill, 71.
Phila. R. R. Co. *v.* Howard, 13 How., 344.
Hale *v.* Clagett, 2 Md. Ch., 151.
Black *v.* Woodrow, 39 Md., 194.
Orange R. R. Co. *v.* Placide, 35 Md., 315.
Rittenhouse *v.* Mayor, 25 Md., 336.
U. S. *v* Behan, 110 U. S., 338.

Referee's costs, $550.00.

J. J. JOHNSON, *Referee.*

Here the defendant rested. And the plaintiff in rebuttal thereupon called W. PRESTON WILLIAMSON, who gave testimony substantially as follows: That just before the writing of his letter to the Commissioners he had an agreement and understanding with Mr. Ross, and Mr. Ross seemed to be very presistent about one point, and that was that this should be a finality, stating that if witness would write a letter and say that this should be an end of it, whether it is decided for or against us, he would accept it and agree to it. The *the* pencil memorandum on the back of witness' letter was never communicated to him.

On cross-examination witness said that he wrote the letter at his office, 912 F street; that he did not know why the District filed exceptions, as it was understood that the report was to be final; that witness filed the motion to confirm the award because he

thought it the best thing, the only thing, that could then be done, and that he thought it would be simply a matter of form, and that he would have a confirmation at once of the award,
41 and that the money would be paid; but the District, instead of doing that, violated its agreement; that witness did not remember ever consenting to the filing of exceptions to the award. Now that counsel shows him the paper which is the exceptions to the award, witness remembers that he signed the paper consenting that the exceptions should be filed *nunc pro tunc*. Mr. Richardson came to him and asked him if he would make any special objection to the exceptions being filed; that it ought to be filed, so that the District might make their objections, and for that purpose he did it, and he did not consent to it because he thought it was not final; that there was not a copy of the award served by him on the Commissioners; that Mr. Johnson was their arbitrator and it was not for witness to serve them with a copy.

GEORGE C. HAZELTON, being recalled for the plaintiff in rebuttal, said that he had nothing to do with the filing in court by the arbitrator of his award; that he did not direct it to be filed in court, and he did not have a word with Mr. Johnson about it. If he had found for the District, they might have done what they liked with the report. That he knew the result.

This being all the evidence, the plaintiff, by his counsel, prayed the court to instruct the jury as follows:

If the jury find from the evidence that the letter in evidence, dated September 16, 1891, addressed to the Commissioners of the District of Columbia, was sent to the Commissioners, on or about the day it bears date, by Mr. Williamson, as the attorney for Elizabeth L. W. Bailey, administratrix of the estate of Davis W. Bailey, deceased, with the knowledge and by the authority of Mrs. Bailey; that the Commissioners of the District of Columbia accepted the proposition contained in that letter, to the effect that they should appoint some good man as referee or arbitrator, to whom one of the cases now on trial (No. 24279, at law) should be referred, with power to hear the evidence and make an award, which should be accepted, whether for or against the plaintiff in that case, as a final settlement thereof; that in pursuance of such acceptance said Commissioners, on the 11 of January, 1892, made the order in evidence of that date appointing J. J. Johnson referee in said case; that said Commissioners at or about the date of said order communicated the same to said Williamson, as attorney as aforesaid, and also to said Johnson; that said Johnson accepted the appointment; that thereafter the attorney for the District and said attorney for the plaintiff appeared before said Johnson and informed him that they were ready to proceed with the hearing before him as referee under said appointment, and that they both understood and agreed that his finding was to be a final determination of the case, and that the attorney for the District did this by express authority from said Commissioners; that thereupon the plaintiff and the de-

fendant in said case, by their respective attorneys, presented their evidence and made their arguments to said Johnson as referee as aforesaid; that pending such hearing before the referee
42 the declaration in the case was amended by consent of counsel for the District, as has been testified by the witnesses for the plaintiff; that after the parties to said suit, by their respective counsel, had fully presented their evidence to said Johnson and had made their arguments thereon they submitted the case to him for final determination, in pursuance of said agreement; that afterward said Johnson made and signed the report or award which was filed in said case on the 18th day of July, 1892, and which is in evidence; that in making or signing said report or award said Johnson intended to make a final finding in the case in pursuance of said agreement between the parties; that the filing of said paper in said cause was the act of said Johnson himself, without the request of or any authority from the parties or either of them to said cause, by their attorneys or otherwise; that it had not theretofore been agreed by said parties, by their counsel or otherwise, or understood by them in any way that the finding of said Johnson, when made, should be filed in said cause or returned to court; that said reference to said Johnson was for the purpose hereinbefore stated and not for the purpose of having him report to the court the facts in said case, to be reviewed by the court as the basis of its judgment; that the defendant had notice, on or about the 18th day of July, 1892, that said finding or award had been made by said Johnson and had been filed in said cause, and that no part of said award had been paid to the plaintiff, then the jury are instructed that they should render a verdict for the plaintiff in the sum of $10,519.20, with interest from the 18th day of July, 1892.

Granted.

The defendant, by its counsel, asked the court to instruct the jury as follows:

1. On the whole evidence in cause at law No. 24279 the jury should render a verdict for the defendant. This prayer was granted.

To the granting of this prayer the plaintiff, by her counsel, duly excepted, and the exception was noted on the minutes of the court before the jury retired to consider of their verdict; and the plaintiff requests the court to sign this her bill of exceptions, which is done accordingly this — day of April, *nunc pro tunc*.

The defendant further asked the court to instruct the jury as follows:

2. The jury are instructed on the whole evidence in cause No. 34564 they are to render a verdict for the defendant.

Refused.

3. The jury are instructed that the Commissioners of the District of Columbia were without authority to agree to submit the matters in controversy in the case of Bailey, adm'r, *vs.* The District of Columbia, at law, No. 24279, to the final award of an arbitrator, but that said Commissioners had authority to agree to refer the case for

the award and report of a referee, subject to the approval of the court.

(Refused.)

4. If the jury believe from the evidence in this case that the
43 case of Bailey, adm'r, *vs.* The District of Columbia, No. 24279 at law, was by the Commissioners of the District of Columbia, on the 11th day of January, 1892, referred to John J. Johnson, Esq., to report the law and facts applicable thereto and ascertain what, if anything, was due to the plaintiff, and that said Johnson so reported and filed his report among the proceedings in that case and the defendant filed its exceptions thereto, then they are instructed that the plaintiff is not entitled to recover in the case of Bailey, adm'r, *vs.* The District of Columbia, at law, No. 24564, and their verdict should be for the defendant.

Granted.

5. The jury are instructed that the plaintiff, as administratrix of the estate of her deceased husband, was without authority to agree to refer the claim of the estate to arbitration without the previous direction of the supreme court of the District of Columbia, holding a special term for orphans' court business.

Refused.

To the refusal of the court to grant said several prayers of the defendant numbered 2, 3, and 5 and allow the same to be read to the jury, and to the granting of the said prayer of the plaintiff the defendant, by its counsel, excepted, severally and respectively, and said exceptions were noted upon the minutes of the court, and the said counsel prays the court to sign and seal this the defendant's sixth bill of exceptions to said several rulings and each of them, which is accordingly done, now for then, this the — day of ——, 1896.

—— ——, *Justice.*

Thereupon the justice presiding, of his own motion, instructed the jury as follows:

By the COURT: Gentlemen of the jury, you have been sworn to try the issues joined between the plaintiff, Mrs. Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased, her husband, against The District of Columbia. Now, gentlemen, you will take with you two declarations; the first is the declaration of Davis W. Bailey as plaintiff, in which his wife, Elizabeth L. W. Bailey, was afterwards substituted as administratrix, against the District, in which, as you have heard during the trial, a claim was made for certain compensation upon a contract, which the court need not now detail.

The second suit is brought by Mrs. Bailey, as administratrix of her husband, against the District, suing for a sum of money found upon an award in her favor, as the result of an arbitration claimed to have been entered into between the plaintiff, Elizabeth L. W. Bailey, administratrix of her husband, and the District of Columbia, by its agents and officers. The court leaves to you the question of

fact involved in the suits you are to try, but relieves you from the consideration of the first suit by instructing you that in suit No. 24279 there has not been sufficient evidence to sustain the plaintiff's case, and in that case you will return a verdict for the defendant, The District of Columbia. In the second case you will return
44 a verdict for the plaintiff or defendant, according as you may find the facts to be under the instructions the court will now read to you.

If you find the state of facts, gentlemen of the jury, set out in this instruction in the remaining case, No. 34564, it would be your duty to find for the defendant in this action. Listen to this instruction: "If the jury believe from the evidence in this case"—that is, the case of Bailey, administratrix, against The District of Columbia, No. 24279 at law; that is the first case which I refer to—"that the case of Bailey, adm'x, *vs.* The District of Columbia was by the Commissioners of the District of Columbia, on the 11th day of January, 1892, referred to John J. Johnson, Esq., to report the law and facts applicable thereto and to ascertain what, if anything, was due to the plaintiff—the original plaintiff—upon the cause of action stated in the declaration in that case, and the said Johnson so reported and filed his report among the proceedings in that cause, and the defendant filed its exceptions thereto, and the plaintiff moved for judgment on the said report or award, then they are instructed that the plaintiff is not entitled to recover in the case of Bailey, adm'x, against The District of Columbia, No. 34564 at law"—that is, this second case, the case of the administratrix; you will have the declarations whereby you can distinguish the two cases, "and their verdict should be for the defendant." That is to be considered by the jury in connection with the evidence here that Mr. Johnson filed what was urged by the defendant to have been a report under what is here urged to be a reference out of court in the first law case, and made for that purpose, and returned into court as an ascertainment of the fact and not as a final arbitrament of Mr. Johnson as an arbitrator. In that connection you are to consider the proceedings in this case; that thereafter exceptions were filed to that report, as has been detailed in your presence, and the proceedings in the case have been offered in evidence, the exceptions to the report and motion to confirm that report in the first proceeding—that is, in No. 24279. Those are the circumstances to be considered by you in reaching the intent of the parties, which will determine your verdict; and if, upon all the proceedings referred to in the instruction I have read you, you shall find by a preponderance of the evidence that there was simply a reference to Mr. Johnson to report, in the language of the instruction I have read to you, the facts and law applicable to that controversy, in 24279, and that Johnson did so find and report and file his report in that case, and thereafter, in pursuance of the understanding of both parties as the mode of conducting the litigation, the plaintiff moved for judgment on the report or award, and proceedings were therein had indicating on both sides a purpose to have that, the finding of Mr. Johnson, simply as one stage in the first lawsuit, then the plain-

tiff would not be entitled to recover in this second lawsuit, No. 34564, because that is a suit which is brought upon what is claimed to be an award made by an arbitrator; and if you come to the conclusion upon all those facts that the proceeding was as indicated in
45 that instruction and by my subsequent statement and the proceedings in that first lawsuit, then that proceeding would bar this plaintiff from recovering in the second lawsuit, number 34564, and your verdict should also be in that case for the defendant, as well as it should be, and as the court has already told you your verdict should be, for the defendant in 24279.

Now, on behalf of the plaintiff, the court asks your attention to the reading of this instruction, for if you find the matters of fact herein read to you, then your verdict should be for the plaintiff in the second lawsuit, 34564, which is a suit upon the report or award or opinion of Mr. Johnson, as it were, as the award upon an arbitration by him wherein both parties had submitted their contentions for his opinion and conclusion by final action upon his finding, and the suit is upon that finding of Johnson as an award made by an arbitrator agreed upon between the parties. I will read it to you.

If the jury find from the evidence that the letter in evidence, dated September 16, 1891, addressed to the Commissioners of the District of Columbia, was sent to the Commissioners, on or about the day it bears date, by Mr. Williamson, as the attorney for Elizabeth L. W. Bailey, administratrix of the estate of Davis W. Bailey, deceased, with the knowledge and by the authority of Mrs. Bailey; that the Commissioners of the District of Columbia accepted the proposition contained in that letter, to the effect that they should appoint some good man as a referee or arbitrator, to whom one of the cases now on trial (No. 24279 at law) should be referred, with power to hear the evidence and make an award, which should be accepted, whether for or against the plaintiff, in that case a final settlement thereof; that in pursuance of such acceptance said Commissioners, on the 11th day of January, 1892, made the order in evidence of that date appointing J. J. Johnson referee in said case; that said Commissioners, at or about the date of said order, communicated the same to said Williamson as attorney as aforesaid, and also to said Johnson; that said Johnson accepted the appointment; that thereafter the attorney for the District and said attorney for the plaintiff appeared before said Johnson and informed him that they were ready to proceed with the hearing before him as referee under said appointment, and that they both understood and agreed that his finding was to be a final determination of the case, and that the attorney for the District did this by express authority from said Commissioners; that thereupon the plaintiff and the defendant in said case, by their respective attorneys, presented their evidence and made their arguments to said Johnson as referee as aforesaid; that pending such hearing before the referee the declaration in the case was amended by consent of counsel for the District, as has been testified by the witnesses for the plaintiff; that after the parties to said suit, by their respective counsel, had fully presented their evidence to said Johnson and had made their arguments thereon they submitted

the case to him for final determination in pursuance of said agreement; that afterward said Johnson made and signed the report or award which was filed in said case on the 18th day of July, 1892, and which is in evidence; that in making and signing said
46 report or award said Johnson intended to make a final finding in the case in pursuance of said agreement between the parties; that the filing of said paper in said cause was the act of said Johnson himself, without the request of or any authority from the parties, or either of them, to said cause, by their attorneys or otherwise; that it had not theretofore been agreed by said parties, by their counsel or otherwise, or understood by them in any way that the finding of said Johnson, when made, should be filed in said cause or returned to court; that said reference to said Johnson was for the purpose hereinbefore stated and not for the purpose of having him report to the court the facts in said case, to be reviewed by the court as the basis of its judgment; that the defendant had notice, on or about the 18th day of July, 1892, that said finding or award had been made by said Johnson and had been filed in said cause, and that no part of said award has been paid to the plaintiff, then the jury are instructed that they should render a verdict for the plaintiff in the sum of $10,519.20, with interest from the 18th day of July, 1892.

The court instructs you that if upon all the evidence—the evidence of Mr. Williamson, Mrs. Bailey, Mr. Douglass, who was then Commissioner; Mr. Hazelton, who was then attorney; Mr. Johnson, who was then acting in the capacity that you have heard discussed here, you find the facts to be as stated in this instruction, then your verdict should be for the plaintiff for the amount of the award, which is stated in the declaration, which you have before you, in case 34564, with interest from the 18th of July, 1892. You are to balance all the evidence, the records in the case tending to support the contentions of the defendant, the testimony given by Commissioner Ross and all the other witnesses, and balance all the testimony, the recollections of the witnesses of the past transaction, and from that you are to conclude whether the proceeding was as is here claimed by the defendant, and, of so, to find for the defendant in the second case as well as in the first; but if upon all the evidence you find the facts to be as carefully stated in the instruction, as just read, for the plaintiff, you are then to find for the plaintiff, and in that sum of money, with interest from that date, as set out in the declaration, which sets out that claim as an award of Johnson as arbitrator, by consent of the parties, that is pursuant to their consent and submission to him, and a finding within the scope of their submission to him, as an arbitrator, finally concluding a litigation—a litigated case, in this court pending. As you may find you will return your verdict, but say in the case 24279 that you find for the defendant, and be careful to say in the second case, 34564, if you find for the defendant, that you find for the defendant simply and no more, and if you find for the plaintiff that you find for the plaintiff and in the sum of money set out in the declaration, $10,579.20, with interest from the 18th day of July, 1892.

Mr. THOMAS: Will your honor explain to the jury the difference between a report, as we claim, and an award by an arbitrator?

47 COURT: In support of the law contended for and the facts urged upon you by the defendant in this case, you will understand that there is this difference between an arbitration and an award and a reference out of court, which the defendant claims that this was: In an arbitration the parties agree, as they may, to submit to one, two, or three persons—in this case it is claimed to one person—all the matters in dispute therein, either in a pending lawsuit or a controversy, not a lawsuit. In this case it was a pending lawsuit, and if the parties agree out of court to submit the matter in dispute to the arbitration of one person, as is here claimed, with a right to finally hear and determine, and that his finding shall be conclusive, then such finding, when made by him by such agreement of the parties to the dispute, such proceeding is an arbitration, and the finding by him is called an award, a final award, which the party in whose favor it is may sue upon or demand payment on an ordinarily receive payment in. In a contested litigation, on the other hand, it often happens that at the instance of one party or the other a reference out of court under the order of the court, with its sanction and approval, is made, whether to find a complicated matter of fact and report the finding of fact or, under certain conditions, to make a finding which would be, if not excepted to or not set aside, in the nature of a final award itself when ratified by the court in that proceeding. If you find in this case that this proceeding was of the second class, it would be incomplete and would not support a declaration in the second case. The court having told you already that in the first case there was nothing to support the declaration in that case, and in that case, because of the character of it as a report to be returned into court, you could not find upon it as an award; but if you find, on the other hand, it was in the nature of a final arbitration, submitted to Mr. Johnson, and his award thereupon as a final award, as I have already instructed you, then upon that final award you could find for the plaintiff in the second suit, as stated.

A report to be returned into court would be subject to be set aside on motion or to be ratified upon the motion of the court, or exceptions could be filed to it, and upon the exceptions there might be this or that action, favorable or unfavorable, and that would be in nowise a finality if it took that course. In other words, if this was simply a reference out of court and for the further action of the court, then in that case you would find for the defendant in the second lawsuit as well as in the first. If, on the other hand, you conclude that it was an arbitration agreed upon, then you should find for the plaintiff as upon a final award by consent of the parties, who intended it should be final, and your inquiry is after all a matter of fact as to whether it was an order out of court for further steps or a final award by consent of the parties, so understood by them, that the finding by Johnson was to be a final award; and if so, you would find for the plaintiff; and if not, you would find

for the defendant. Perhaps further multiplication of words might tend to confuse you.

Before the jury retired the defendant, by its counsel, duly
48 excepted severally and respectively to such parts of said charge as *as* are contained within brackets, and requested the said justice to note said exceptions upon his minutes, which was done, and the said counsel requests the court to sign and seal this its seventh bill of exceptions, which is done, now for then, this 5th day of May, 1896.

L. E. McCOMAS, *Justice.* [SEAL.]

Filed July 18, 1892. J. R. Young, Clerk.

WASHINGTON, D. C., *February 17th*, 1892—10 o'clock a. m.

Met, pursuant to agreement of counsel, at the offices for the attorney for the District of Columbia, # 338 Indiana avenue, to take testimony for and on behalf of the plaintiff in this cause pursuant to order of reference.

Present: Mr. Hazelton, for the District; Mr. Williamson, for the plaintiff; Mr. Johnson, the referee, and the witness.

Whereupon Mr. Williamson said as follows:

The claim which we propose to present now before you as — is for the resurfacing of certain streets and parts of streets with asphalte within and for the District of Columbia under and by virtue of a certain contract made by and between the Commissioners of the District of Columbia and the Bailey-French Paving Company, by Davis W. Bailey, in 1879. This contract was dated on the 30th day of July; that under that contract he was awarded the work of resurfacing the streets which are therein named at the price therein named; that Bailey entered into this contract and complied with all the requirements as specified by the Commissioners, and went on with his work faithfully until he had completed something over one-half, when the Commissioners arbitrarily sent him a letter, which letter was dated on the 12th of February, 1880, rescinding the unexecuted balance of the contract. We will show that when they rescinded this contract that we had performed our contract up to date in previous accordance with the agreement, and that we were then in a position and fully prepared to continue and complete the contract as we had agreed; that we had on hand large quantities of materials, entirely sufficient to complete this work, as well as machinery; that this material was nearly all a complete loss to Bailey; that his machinery was also nearly a complete loss; and in addition to that we are claiming here that Bailey is entitled to a one-half inch extra surface, which was not required by the contract, and for which he has never received a dollar; that the pavement which he laid was a half an inch thicker than required by the contract or by the rules or regulations; that he was compelled and required to do this, although he protested against it to the Commissioners and the officers in charge, but they compelled him and required him to do it, and that he did that work, and for that we claim the additional amount. Our claim, then, will consist of payment for the one-half

inch of extra surface, the profit on the balance of the unexe-
49 cuted contract which they stopped and prevented us from furnishing, and the loss which we sustained from the loss of material and machinery.

I think that is all the statement that I desire to make in explaining the case.

Mr. JOHNSON: Were you paid for the work that was done under the contract as fas as it was executed?

Mr. WILLIAMSON: We were paid for the work as far as it was executed, that is specified, but not for the one-half inch.

Mr. JOHNSON: I understand that is one of your claims?

Mr. WILLIAMSON: That is one of our claims. I think I have stated it fully. I can state further that our claim rests upon the profit which we would have received if we had been allowed to finish the contract and the extra half inch surface which we were required to do and the loss which we sustained for and in consequence of the loss of the machinery and material on hand at the time of the rescinding of the contract. I will have Mr. Bailey sworn.

FRANCIS D. BAILEY, a witness of lawful age, being by me first duly sworn according to law, testifies as follows:

By Mr. WILLIAMSON:

Q. Mr. Bailey, were you acquainted with Mr. Davis W. Bailey?
A. I was.
Q. In 1879?
A. I was.
Q. Were you in any way connected with him in business?
A. I was.
Q. About when was it?
A. I was foreman of the factory and my business called me onto the street frequently to see that the work was going on right.
Q. Did he have any contract to do any particular work?
A. He did.
Q. Who was the contract from, if you know?
A. The District of Columbia.
Q. Is that the contract?
A. It is.

Mr. HAZELTON: Is that the original contract?

Mr. WILLIAMSON: It is one of the originals; there are three originals.

Mr. HAZELTON: Well, now, suppose that we agree here that any exceptions may be taken to any part of this testimony by either party when we get through or at any time.

Mr. WILLIAMSON: All right.

Mr. JOHNSON: It is agreed that objections may be made at any time that may be desired.

Q. Is this the contract under which the work of which you have spoken was done?
A. It is.

Mr. WILLIAMSON: I offer it in evidence as Exhibit "A."

50 Q. You have stated that you were connected with Mr. Davis W. Bailey in doing work under this contract. What was your position there?

A. I was foreman of the factory, and in my position I had to go onto the streets frequently to see that the work was going on correctly.

Q. What were your duties at the factory?

A. Refining the asphalte and making the pavement; running the whole factory.

Q. Do I understand you that you made and prepared the pavement?

A. We were preparing the pavement for the street.

Q. Did you see the work named in this contract as it was being laid? Will you look at the contract and tell me?

A. I did.

Q. Did you complete the work under that contract?

A. We did not.

Q. Why?

A. We received a letter from the Commissioners dated the 12th of February, 1880, telling us that they rescinded part of the contract from the want of money to go on which had been appropriated by Congress for this contract.

Q. I hand you that letter. You will please look at it and see if it is a copy of the letter which you refer to.

A. It is.

Mr. WILLIAMSON: I offer that in evidence as a copy of the original Exhibit "B."

Q. Do you know where the original letter is?

A. I do not.

Q. I state now that the original letter, of course, is in the hands of the Commissioners, and that we have no means of getting that. Do you think that that is a copy of the letter?

A. I know it is.

Q. Was there any other reasons given by the Commissioners for cancelling the contract?

A. There was none.

Q. When you received the letter from the Commissioners rescinding the unexecuted balance of the contract, how much remained to be completed of the whole contract?

A. About fourteen thousand (14,000) yards.

Q. Were you in a condition and able to complete that whole contract at that time?

A. We were.

Q. Did you have any material on hand?

A. We did have a large stock of material on hand necessary to finish the contract.

Q. Did you have any machinery?

A. We did.

Q. If you had been allowed to complete the contract, would you have made any profit?

51 A. Yes, sir; we would have.

Q. How much profit would you have made if you had been allowed to complete the contract?

A. Well, you mean on that part which was not executed?

Q. On the unexecuted balance.

A. We would have made about $5,000 on that part of it.

Q. Could you explain how you came to that conclusion?

A. By figures that I have repeatedly made in estimates on this work and the difference between the costs and the price that we got for it.

Q. Will you be kind enough now, Mr. Bailey, to show us how you can arrive at the conclusion that you would receive a profit of $5,000 on the unexecuted balance of this contract?

A. I took the figures on that class of work from figures that I made from previous contracts, and then figured it right down to mills; then what each part cost and whole cost would have been from 47 to 49 cents, and I allowed it to cost 51 cents, and the price between that and the price that we would get for the work would be 35 cents. 14,000 yards at 35 cents would be just about $5,000, or a few dollars short of it. Just the exact mills now I have not in my mind, but I get at it in that way.

Q. Now, have you stated there, Mr. Bailey, what the material would cost in your estimate?

A. Well, the material and labor, I think——

Q. And then after stating the cost of the material and labor you estimated just what the profit would be?

A. Yes, sir.

Q. And you say that the profit on this work would have been thirty-five cents?

A. Thirty-five cents a yard.

Q. And there was how many yards?

A. Well, in actual figures the difference was 14,000 yards, and the work, if we had completed it, would have run over that, because they always run a little over the estimates. They always have the contract more or less, and we never had them run under; always over.

Q. Now, Mr. Bailey, did you do any extra work or other work that is not charged for?

A. We did.

Q. And for which you have not received any pay?

A. We did.

Q. Will you state what that work was?

A. Half inch extra surface laid on the whole street; all the work we did.

Q. Mr. Bailey, would you be kind enough to look at that contract again and tell me how much work you did—the contract calls for, I mean?

A. The contract calls for about 46,000 yards.

Q. Now, I understand you to say that you had laid the half inch on some portions of that work—an extra half inch?

A. We did.

52 Q. Will you be kind enough to state on what portion of the work or how much of the work you laid this extra half inch?

A. We laid it on all of it—all that we did.

Q. Now, Mr. Bailey, will you say how much you did do?

A. A small fraction short of thirty-two thousand yards.

Q. How much will you state you were entitled to for laying the extra half inch?

A. A little over $6,000.

Q. How did you arrive at that, Mr. Bailey?

A. I figured it this way: The price of the work was 95 cts., and that would comprise two and a half inches of pavement. There would be five and a half inches—that takes one-fifth of the 95 cts., which is 19 cents—and we finish 32,000 yards, at 19 cts. a yard, which would be a little over $6,000.

Q. How thick were you to lay this pavement, according to your contract?

A. Two and one-half inches.

Q. How thick in real-ty did you lay this concrete?

A. Well, at least three inches, and over that in a great many places; it would run over four.

Q. Why did you do it?

A. Because we were compelled to by the Commissioners—by the engineer department.

Q. Did you protest against it?

A. We did, repeatedly and continually.

Q. They required it still?

A. They did.

Q. Did you ever receive any pay or compensation for this half inch?

A. We did not.

Q. When I say did, Mr. Bailey, I mean did Mr. Davis W. Bailey.

A. I understand.

Q. There was nothing paid?

A. There was not.

Mr. HAZELTON: For this extra half inch?

WITNESS: Yes, sir.

Q. I ask you right in that connection was anything paid you on the loss or damage which you sustained—which Mr. Davis W. Bailey sustained—in consequence of the revoking of the contract?

A. There was not.

Q. Did you have any machinery on hand at the time the contract was revoked?

A. We did.

Q. And if so, what was the character of that machinery?

A. There were kettles for refining asphalte, kettles for drying in oil tanks, engine, boiler, mixer, rotary sand-dryer, or hearths, you

might call them; iron and stone rollers. That just about comprises the whole of them.

Q. What was the value of those?

53 A. About $10,000.

Q. What became of the machinery?

A. It was disposed of at a loss of about $5,000.

Q. Did you have any material on hand?

A. We did.

Q. Did you sustain any loss on account of that?

A. We did.

Q. What was the loss, if you know, from the material?

A. Well, I should judge all of it was a loss to us.

Q. What was the value of it?

A. The value was from six to seven thousand dollars.

Q. Did you know a gentleman by the name of Dr. E. T. Hanmer?

A. I did.

Q. When did you know him?

A. In 1876.

Q. What was his occupation when you knew him?

A. Directly after I knew him he was foreman on the street in this paving contract. I knew him a short time before that.

Q. Did you mean that he was foreman under that contract for the District Commissioners to Davis W. Bailey?

A. Yes, sir; under this contract No. 222.

Q. Was he engaged in the work embraced in that contract?

A. He was.

Q. In what capacity, did you say?

A. He was the foreman on the street.

Q. Where is he now?

A. He is dead.

Q. Mr. Bailey, I notice that that contract there is between the Commissioners and the Bailey French Paving Company, by Davis W. Bailey, agent. Will you explain that—who the company is?

A. It was Davis W. Bailey. It had been the Bailey French Paving Company, and he was the only one at that time and he continued it in that name.

Q. Was any one else interested in this contract except him?

A. There was not.

Q. He was the only one, then, as I understand you to say, that was interested in this contract?

A. That is right. He was.

Q. He carried it on in that name because he was formerly doing business under that name?

A. Yes, sir; that is right.

Hereupon the further taking of testimony in this cause was adjourned until Friday, February 19th, 1892, at 10 o'clock a. m.

WASHINGTON, D. C.,
February 23*rd*, 1892—10 o'clock a. m.

Met, pursuant to adjournment, at the law offices *for* the attorney for the District of Columbia, # 338 Indiana avenue, to take testimony for and on behalf of the plaintiff in this case.

Present: Mr. Hazelton, for the defendant; Mr. Williamson, for the plaintiff; Mr. Johnson, the referee, and the witnesses.

54 Whereupon the cross-examination of Mr. BAILEY was begun by Mr. Hazelton:

Q. You are the son of the original complainant in this case, I believe, Mr. Bailey?

A. I am.

Q. You remember the year the work was done?

A. 1879 and 1880.

Q. What streets were covered by the contract?

A. Well, I have not those in my mind. I have a little record in my pocket of them; but H street is part of it, from 18th to 22nd, and also from 5th to 7th. I can read them from this book if you want them.

Mr. WILLIAMSON: You have a right to refresh your memory.

Mr. HAZELTON: I would like to have you state them.

A. There was G street from 5th to 7th and part of 13th street; 18th street from K to Pennsylvania avenue; H street, 18th to 22nd, and H street, 7th to 10th, and 20th street from New Hampshire avenue and M streets to B street and Delaware avenue and First street.

Q. Who made that memorandum?

A. I made it.

Q. When?

A. A few days ago, from the original contract. That is the way I refresh my memory as to the streets that were finished.

Q. Now, at the time that this contract was made with your father—at the time the work was done how old were you?

A. Today I am 40, and that was in 1879; that would be 12 to 13 years ago.

Q. What position did you hold under your father in reference to the making and execution of this contract?

A. I was foreman of the work in the yard—going onto the streets looking after the work to see it done properly—and before the contract was made I took the specification and walked over all this work and estimated on it and made up the princip*le* figures for the bids that had been put in. I had been several years before that——

Q. What was the estimated amount of the work that you made up?

A. In dollars?

Q. Yes, sir; dollars—yards—you may take it in yards.

A. A little over forty thousand ($40,000) dollars and about forty-six (46,000) thousand yards.

Q. And what was the contract price for doing the work?

A. Well, it averaged about, for what was finished, ninety-five cents—it ran from eighty-two to one dollar and five cents ($1.05) per square yard.

Q. Was it a condition of the contract that you were to do any extra work that you were ordered to do by the Commissioners?

A. It was.

55 Q. Were you to have any extra pay for that if it was ordered under the contract?

A. We were.

Q. How much?

A. Well, that is not stated in dollars and cents, but——

Q. Who was to decide that?

A. Well, it was to be decided by the Engineer Commissioner; that is what he stated, as I understood it—if there had been any more of that work done of that class, then we were to be paid at that rate.

Q. Was that in the contract?

A. That is in the contract, and if there was not any work previous of that class, then a fair price was to be paid for the work.

Q. Were you present when the contract was made?

A. I do not remember that I was there when it was signed.

Q. Were you present when any of the work was measured?

A. I was not—not that I remember of now.

Q. When the extra work was estimated for were you present?

A. No, sir; I was not.

Q. Then you do not know of your own personal knowledge how much there was of it?

A. No, sir; I do not, except as it came to me after the measurements were made.

Q. Except by hearsay?

A. That is all.

Q. Do you know of your personal knowledge how much money was paid on this contract to your father?

A. I was not present when it was paid, but I know from the keeping of books that there was $30,000.

Q. You were not present when it was paid? You know nothing about it except what you saw on the books?

A. Except as he would bring the account to me, and we would take it and make the deposits.

Q. You do not know of your personal knowledge what was paid to him; only what you heard from him afterwards?

A. Yes, sir; that is the way I understood it.

Q. How much money do you know of your personal knowledge your father received on this contract in all?

A. Looking at it in that way, I do not know of anything; but as I was figuring on this work I am very positive there was over $30,000 paid. It could not have been otherwise. I did not handle the money myself, but I had figures.

Q. How was that money estimated upon? What estimate was that money paid for—the $30,000?

A. As I understood, on the——

Q. Give your personal knowledge.

A. It was made up, the bulk of it—well, I did not see the figures made, but the way I understood the engineer, they would say about so many yards of pavement there, and we will give you so much on that.

Q. Who made that estimate?

56 A. The engineer.

Q. Then when the work was finished it was measured by the engineer of the Commissioners' office—the men who would do the surveying part of it—and the bills were paid by the figures that he made up?

A. I did not stand there and see him make the figures.

Q. You say you received about $30,000?

A. $30,580 by the books.

Q. What was that $30,000 for? Give the specific work.

A. For the specific work in the contract—for the laying of the pavement and not for extra work. When I went over that book I did not not estimate on digging trenches, connecting sewer basins, catch-teaps, and that part of the work. That we did afterwards and we were paid for it extra.

Q. The $30,000, then, was for the pavement that you did under the contract—the asphalte, was it not?

A. Yes, sir.

Q. Well, what did you do? What was the work that you did under the contract in the street? What was the first thing that you did?

A. The first thing that we did was to dig out the street, if there were any holes, level it up with what we called a pointer, and then there was in most of the places about three feet or about a yard cut out at the gutters so as to make them lower, and that was filled in and we laid a half inch of asphalte, and on top of that we were supposed to lay two inches, in addition to the asphalte.

Q. What did you lay the asphalte on?

A. We laid it on the old pavements or on the new base that we put in. If there were any holes they were resurfaced——

Q. This work was resurfaced—that was old work?

A. Yes, sir.

Q. Well, what was it, a contract? Did the contract provide that you were to do new work from the bottom up?

A. Only so far as we were to dig holes—that is, in case it was worn through we were to put in new. If there was any hole worn through deep enough, as there was occasionally little holes, then we were to put on a second course, and sometimes it would run a little below that.

Q. What was the first base?

A. It was supposed to be stone and covered with coal tar, as I understand.

Q. And what was on top of that?

A. The original base or the bulk of the original base, as I have seen it done up to that time—about six inches of broken stone put

in and then some coal tar thrown on top of that so that the next coat would stick to it.

Q. I wonder if you understand me. I want to know when you went there just what the condition was—what the top of the base was that you went to work on to repair.

A. I understand now what you mean. There was asphalte
57 or coal-tar pavement. That had been worn through. The top had all been worn off.

Q. What is coal-tar pavement?

A. It is made out of coal tar instead of asphalte That is what they were using principally up to that time.

Q. Then your contract was to repair and cover that with asphalte?

A. Yes, sir; with a mixture to make the pavement to look the same as the street.

Q. Wherever there was a hole you were to fix that and make it solid?

A. Yes, sir.

Q. That was in the general contract?

A. Yes, sir.

Q. It had been originally intended to stop the resurfacing within about two feet of the gutter and leave a bevelled edge, and between this and that the old pavement was not to be touched. Is that true?

A. I do not remember what the contract says in regard to that. I know what was done.

Q. Well, what was done?

A. We cut out about three feet and then we were paid extra for that.

Q. You cut out three feet where?

A. Between the gutter that is on the surface of the old pavement before we resurfaced it. We cut away three feet of the old pavement and lowered it, so as to make the grade, and then put in this broken substance—that is, we would not take it away down to the bottom of the pavement, but down to the original base.

Q. Did you leave a bevelled edge between that and the curb?

A. I do not know as I understand what you mean by bevelled edge. It had a slant down so as to make the gutter there.

Q. Was there any modification of the contract as to price, as you went along, that you know, or as to its construction that we have just been speaking of, about the gutter; and, if so, will you state what that modification was?

A. As I figured on that work, we were to lay the top of it only, and what we did was to cut out three feet and lay in part of that.

Q. You cut out what?

A. About three feet.

Q. For what purpose?

A. That was for the purpose, as they claimed, of making the gutters true.

Q. Well, how about the curb? Did it effect the curb in this new plan or modification?

A. Well, they had to reset the curbs and sidewalks, and oftentimes to either lower or raise them to the proper grade.

Q. Was there a modification that you were to lay an entirely new pavement in the gutters?

58 A. Not as I understand it. We did in a great many places because we had to do it to make it a solid base.

Q. Do you know how much, at what rate, or anything about it?

A. That was made up as an extra bill, and I know the amount of it, but I have not the bill figures at this time.

Q. You were paid to your satisfaction for that?

A. We were paid to our satisfaction for that.

Q. And you made no protest against the modification of the contract?

A. We were paid the price that they gave us for that.

Q. You made no protest against it?

A. I did not make any protest. I understood that there was one made.

Q. Who by?

A. By my father.

Q. Do you know of your own knowledge that there was any protest made?

A. I do not know about that.

Q. Do you not know that this new paving in the gutter under the new plans, that you were paid much more for it and that it made it much more remunerative for you than the resurfacing under the contract generally?

A. No, sir; I do not.

Q. State whether you know of your personal knowledge whether that was not greatly to your advantage—the pavements in the gutter for which you received extra pay, greatly to your advantage—much more remunerative than the general resurfacing, per yard.

A. It was much to our disadvantage.

Q. It was much to your disadvantage?

A. Yes, sir.

Q. Tell us how it was to your disadvantage. You say that they paid you a good price for it?

A. They did not pay us enough for it to pay us to do it; there was money lost on it.

Q. How do you know that money was lost on it in that way—in paving those gutters on the new plan?

A. We lost money from the fact we had to *had* stop to cut them out, and the labor cost us more than we got for it—the labor and material together.

Q. What did you have to do in order to pave those gutters under the new plan?

A. They had to cut out three feet of that gutter and take out the old pavement, which was hard, and we had to have tools made for it—a cutter—and we had to have them made, and that was a good deal of labor to cut them out, and that delayed us in our work also.

Q. Now, what difference would it make if you were delayed in your work—for you were paid for your work—what you were doing?

A. It was not in the contract and delayed us from finishing our contract.

59 Q. But you were to do any extra work that they called for?

A. Yes, sir.

Q. Then it was in the contemplation of your contract that you should do this?

A. We were to do any work that they wanted us to do.

Q. And they called on you to do this?

A. If they had called on us to do $30,000 of extra work before we laid any pavement, then we would have had our stock of machinery on hand.

Q. Were you not using your stock in paving this extra—the very stock that you used in paving for the other purposes?

A. Well, a small portion of it, but not the bulk of it; that was a different class of material.

Q. How was it different?

A. It was to make the coal tar principally. First this layer of stone about six inches, and then there comes a binder made of firm broken stone mixed with solid tar principally, and then that rolled down, and it makes the surface upon which the cushion coat was laid. Before you lay that, however, it is supposed to bring that up to the grade of the rest of the street so as to make a good grade of it—that is, the original grade of the pavement before we cover it in.

Q. How much of that work did you do—laying new pavements with the extra coating?

A. I do not remember just how many yards it would be.

Q. How much did you receive for it?

A. That and the extra work?

Q. For that alone, if you know.

A. I did not keep that.

Q. Do you know how much you received for the gutter paving under the new plan?

A. Not for the extra—no, sir. They came in as extra work.

Q. Were these things not made out in detail—did not they have to make out an estimate for the extra paving by itself as one item?

A. I think they did.

Q. And the others as an item by itself?

A. They did.

Q. And do you not know what that item was at all?

A. I do not remember the exact division between the two, and I did not keep any estimate of it.

Mr. WILLIAMSON: I will say right there, of course the bills for this extra work were presented to the District of Columbia, and they have receipted bills for this work which has been fully paid for and is not a portion of our claim here at all. Of course, I did not object to anything that Col. Hazelton asks the witness, but I only state that this work is not in dispute. That work has been done and paid for, and the only figure that that work would cut in this case would be this: that by piling that work upon Bailey at the time

that he was going on with this contract of his, it impaired
60 the progress of the contract and prevented him from finishing it within the time specified, and that he did not receive any remuneration for it at all.

Mr. HAZELTON: For this?

Mr. WILLIAMSON: That is, I explain that by saying this: that as the witness has testified the work which he did was a loss to him—no profit whatever—it cost him more to do the work than the Government paid him for it.

Mr. HAZELTON: That is your argument. You have a right to state that, if you want to, but that is one thing and the testimony is another.

Mr. WILLIAMSON: I do not say it by way of objection. I only say that the bills for this part of the work are in the hands of the Commissioners for the District, and of course can be procured by its attorney. They are paid and receipted for.

Mr. HAZELTON: My purpose is to get at the knowledge of this witness as to the business, and I want to see how much he knows about this business. He is able to take care of himself, and he seems to be familiar with the business, and I have no doubt he can answer for himself. I want to get at that for the purpose of seeing how much he knows; not how much he guesses at, but how much he knows about this thing.

Q. Now, I wish to ask you about this extra pavement. Now, then, you say that they paid you for that. Now, you say that they paid you in all $30,000. How much of that $30,000 was applied to this kind of work, if you can tell me?

A. Not any of that part of it, if I may be allowed—you ask me what I know of my personal knowledge about the payments of this money. Now, the accounts were brought in—that is, the measurements for this extra work were brought in—and the bills were made up at the office, and the estimates by the engineer of the District were made up for the pavement, and the bills were made up and presented to the District and the money was paid to *N.* G. Emery, of the Second National bank, and he deposited it to our credit—that is, part of it—and a part of it he paid out, as he was instructed to do, to other parties from our account, and that is my personal knowledge by the bank book of the amount of money that we received.

Q. Have you got the bank book with you?

A. I have not.

Q. What has become of the bank book?

A. I do not know. I left here in 1882. I do not know what became of it.

Q. Within how many days were you to complete this work?

A. About 120.

Q. Within how many days did you complete what you did?

A. Well, I have not figured that out.

Q. Can you tell?

A. The contract was in the last of July, 1879, and we received a

letter, I remember distinctly, on the 12th of February from the Commissioners stating that they had no money, and consequently we could not go on.

61 Q. Your contract was not performed at that time, was it?

A. It was not.

Q. Had not more than the 120 days expired?

A. Yes, sir.

Q. Had more than 200 days expired?

A. Well, I had not figured that out. I can do so very easily and state the number of months and days.

Q. The time you stopped, do you remember?

A. Yes, sir.

Q. What was the date?

A. Just the date we stopped I do not know.

Q. What is the date of the notice served on you?

A. 12th of February. If we had a few more years' work to finish up we would have gone on and finished up that.

Q. But you substantially stopped your work at that time?

A. We did.

Q. What street were you working on then?

A. 13th St.

Q. What were you doing?

A. Laying the surface of the pavement.

Q. Did you leave any of the pavement in a condition that needed surfacing that you did not surface afterwards? Was any of your work left unfinished?

A. There was.

Q. How much of it partly done, but unfinished? That is what I mean.

A. I do not know as I understand you there. If you mean that we had dug it up and partly finished it——

Q. I mean which you entered upon and left it in a- unfinished condition because of this notice served upon you.

A. We finished up to a certain point; so far as we went we finished the work up.

Q. Now, about this $30,000?

A. Now, if you will excuse me, I think you seem to include it in that $30,000, the whole of the money paid to the Bailey French Paving Co. by the District, but they paid over $36,000 in all.

Q. Who?

A. The district paid to the Bailey French Paving Company, not, as I figure, on the contract, but on the extra work.

Q. My first question was how much money was paid for work done under the Bailey contract.

A. It is the matter of the contract there that bothered me.

Q. I do not care whether you called it contract. I will put it this way: How much money were you paid in all?

A. $36,300 in all.

Q. By the District government?

A. Yes, sir.

Q. On that work done?

A. On the streets that have been paved; yes, sir; but $5,000 of this was on this extra work.

62 Q. That would leave them $4,950.86 balance on the amount of the original contract which was not paid?

A. I do not figure it that way; not as I understand it. I understood the contract to be for the specific work, and then they told us to go ahead and do extra work, and that extra work amounted to $5,000.

Q. The original estimate was for $40,950.86 for the estimated work?

A. Well, that was the estimated amount.

Q. That was the estimated amount?

A. Yes, sir; on the pavement, but not on this extra work.

Q. Now, you received in all from the government, whether within the estimated work or extra work or whatever it was—you received in all $36,300?

A. Yes, sir.

Q. And the original estimate was $40,986. Now, there was no extra work done or allowed about that?

A. No, sir.

Q. Do you know the reason why they served this notice upon you to quit?

A. I know the reason that they gave.

Q. What was it?

A. That the money had run out.

Q. If you had done your work within the 120 days, you would probably have had your money, would you not?

A. I do not know anything about that. The money was appropriated by Congress for this work, and it ought to have been there, as I understand it.

Q. How much of the original contract work in the original contract did you perform—did you perform one-fourth or what?

A. Just as near two-thirds—a little above or about as near two-thirds as you could get.

Q. How did you get at that estimate?

A. By the number of yards that we did.

Q. Who measured it?

A. The engineer of the District.

Q. And an account of which was furnished to your father?

A. Yes, sir; it was.

Q. Supposed you could have finished the other one-third of the contract there, I want to ask you what claim you could have made beyond and above what you received. Suppose you had finished the contract and received $40,000 instead of $36,000, how much would you have made?

A. We could not have finished the contract without being paid.

Q. I am not talking anything about extra surfacing or anything else. Suppose you had carried out the estimate made for that contract—$40,000—and received that instead of the $36,000, how much would you have cleared or made? Can you state?

A. On account of the whole contract?

Q. Yes, sir.

A. Well, there would have been—if we had received the
63 $40,000, as I estimated on the original contract, we would have made $15,000.

Q. After having paid for your work—material and everything?

A. If we had finished the 46,000 yards of pavement; yes, sir.

Q. Now, in making that estimate, what did you take into account?

A. The material, labor, and the stock tools.

Q. Did you take in the use of the tools or the price of the tools?

A. The use of the tools.

Q. That is all the machinery?

A. And all that.

Q. You would not estimate in that the original cost of the machinery at all, would you?

A. No, sir; that would be net profit.

Q. Allowing for the use of the tools and all?

A. Yes, sir; the wear and tear of the tools. We figured also on the price of the tools on a contract of that kind. We would figure the cost that they would be worth; they would be worth about half price when we got through and we would have to figure upon them as that much wear and tear on them.

Q. And yet you would have made $15,000?

A. That was allowing for half of the tools to have been thrown away—that is, the loss of the half of the tools because they would be worth about half price when we got through.

Q. You have counted all the machinery now?

A. Yes, sir.

Q. That in your direct examination you regarded as part of the plant?

A. Well, I would change that and say that there would have been at least $20,000 profit; $5,000 of that we would have figured over for loss of tools. The tools that we still have would have brought about $5,000. That would have brought it down to $15,000. You could not set up a plant like that and use it, as a rule, and then get half what you had paid for it—that is, to sell it right out. It is worth more to us.

Q. Your father was paid in full for the work he did under the head of estimated work, was he not, up to the time that he stopped?

A. Well, he was paid by the measurement.

Q. Just answer my question, if you can. Your father was paid in full for all the work done by him at the rates named in the contract—for the estimated work of the contract?

A. No, sir.

Q. He was not. Very well. Tell me wherein he was not.

A. They laid half an inch extra work.

Q. That has not anything to do with the estimated work in the contract, as I understand you. You are getting now on the extra work.

A. As I understand, you asked me if he was paid for the work as estimated. As I understand the question it is this—he was paid

for the two and one-half inches according to their estimate
64 and the estimate of the work done. He was paid for that; he was paid in full for it.

Q. Is that what you intended as an answer to that question?

A. That is as I understand it if he had laid but two and one-half inches.

Q. Then for the estimated work he did under that contract—the work estimated in the contract under the price estimated in the contract—was he not paid in full for it?

A. I say no.

Q. Well, wherein was he not paid?

A. They laid half an inch extra.

Q. I am not talking anything about that. That was not estimated in the contract. There was only a provision in the contract that if they wanted to order that they could do so.

Q. Now, what I want to get at is whether you were paid for all that you did of the estimated work in the contract at the estimated price.

A. As I understand it, my answer was right—that if——

Q. I do not want any if about it.

A. It was paid in full for two and one-half inches of pavement up to the part that he finished. That is just the way I understand it.

Q. Then you cannot answer the question.

A. He was paid for the estimated——

Q. Do you decline to answer the question any other way?

A. No, sir.

Q. Then what other way will you answer it?

—. ——.

A. Well, if I understand what you mean, your father was paid in full for the work that he did under the head of estimated work, was he not, up to the time that he stopped?

A. He was, as I understand it. The estimated work, as I understand it, is the two and one-half inches of pavement.

Q. Do you decline to answer this in any other way?

A. No, sir.

Q. Your father was paid in full for the work he did under the head of estimated work, was he not, up to the time he stopped?

A. It seems to me as if I had answered that very clearly—that he was paid in full for the figures as put in by the surveyor of the District. When the surveyor made up his figures for so much—so many yards of pavement—we were paid according to the contract price. We do not consider that we were paid in full for that work, as they compelled us to lay a half an inch extra. Now, whether I understand your question or not, it seems to me that I have given a straight answer to it.

Q. I want to ask you if the length of time in the performance of a contract does not increase the expense of the District largely by way of inspectors, etc.

A. I have not figured on that.

Q. You do not know about that?

65 A. I should naturally think it would be—I have not figured on what it would cost the District.

Q. Then if the work was to be done in 120 days, within the date of the contract, but was not done for 230 days, it must have increased the expenses of the District of Columbia by the employment of inspectors, etc., very largely?

A. I do not know how the inspectors are employed by the Government. Some of them are——

Q. You were 230 days in doing the work that you did, when the contract bound you to do it within 120 days. Is not that a fact?

A. A little over 200 days. I have not figured it out.

Q. Now, under the contract were you not just as much bound to perform the extra work within 120 days as you were the work estimated for, as you understood it?

A. Well, I should think that would depend upon how much extra work that they put on us.

Q. Did the contract say anything about that?

A. It did not.

Q. Did you understand the contract to mean that whatever work was to be done either estimated or ordered within 120 days, as it said in the contract, that it was to be done? Did you and your father not understand that?

A. We did not figure that it would be done in 120 days.

Q. Why did you sign the contract and agree to do it in 120 days?

A. That is the way that they sign contracts, but my experience is that they do not hold them to that.

Q. That would not have anything to do with this contract. You made a contract, did you not, to do all this work in 120 days?

A. That is right.

Q. Now, you did not do it within 230 days?

A. We did not.

Q. And you left one-third of the amount of the work unfinished then?

A. We did.

Q. You did two kinds of extra work according to your statement. One was in digging out and paving the gutters anew.

A. Yes, sir.

Q. The other was the one-half inch extra thickness of the asphalte over and above what was estimated. Is that so?

A. Yes, sir; and then there was another class of work.

Q. What was that?

A. Digging trenches, laying sewers, connecting sewers, setting basins and sewer traps.

Q. And, as you say, you do not know what the amount of money was out of this $36,000 that was estimated for the gutter paving. Now, how much of it was estimated for the one-half inch extra asphalte? Do you know the estimate for that?

A. We were not paid for that.

Q. What was said about that? What is the reason that they did not pay you for it?

66 A. Because they claim that they should not pay it—because they claimed that we should lay the pavement up to that grade which they gave us.

Q. You did not——

A. We laid the pavement up to the gauge because they compelled us.

Q. And the laying up to the gauge—the one and one-half inch was necessary—it took that one and one-half extra to bring it up to that gauge?

A. I did not understand it in that way. It took one-half inch extra to bring it up to the grade.

Q. But you say that they made a gauge?

A. Yes, sir.

Q. Now, describe to us what you mean by a gauge. The engineer made the gauge, did he not?

A. I do not know what kind of wood it is made out of. It is dark colored, two or three feet long, and one end cut down so that it will set on the pavement, and the other end cut down and the sides of which we must fill with material up to this.

Q. Now, understand me, in filling up to this gauge established by the engineer, as you have stated, did it not take—was not the one-half inch that you claim as extra work a part of that filling?

A. It was.

Q. And that is so throughout these streets wherever you claim for an extra half inch?

A. Well, if I understand your question right, the pavement that we laid there on those streets came up to this gauge—all the pavement that we laid. The pavement was laid loose up to that gauge—not pressed—that is, when it was loose—and it was not only laid up to that gauge, but it was so that we could sink into it at least half an inch when I saw it a great many times, and when that is compressed it did not compress to two and one-half inches, but it compressed to three inches; in some places more than that.

Q. Then after it was compressed it would not come up to the grade, would it?

A. Well, I do not understand why it should not come up to the grade. The gauge was laid so that the grade would be right, if I understand what you mean — grade.

Q. What do you mean by compressed afterwards?

A. It was rolled by hand rollers, and we had a thirteen-ton steam roller.

Q. Before the roller was done the gauge was used?

A. Yes, sir.

Q. The gauge was only used in the first instance?

A. Yes, sir; before it was rolled and after.

Q. Now, in the first place, you filled it up to the gauge with old material?

A. Yes, sir.

Q. Then you took off your gauge and rolled it?

A. Yes, sir.

67 Q. And after you had rolled it if you put the gauge on again you would find that it did not fill up to the gauge?

A. It would not.

Q. Because it was depressed by the roller?

A. Yes, sir.

Q. Then after you had rolled it you had not as much thickness of your asphalte pavement or of your material as you had before you rolled it?

A. We had not.

Q. Then how do you claim for an extra half inch?

A. Because they compelled us to use this gauge.

Q. You did not make any protest, did you, at the time?

A. We did.

Q. Who made any protest as to that?

A. My father and Dr. Hamlink, on the street.

Q. Was it not a necessary part of your work to use that gauge?

A. Not that I know of; I never saw it before. It was after it was rolled that we measured the pavement to see what we had laid. You cannot tell by laying it down; you can only estimate; you can lay just so much, and after it was compressed it was two and one-half inches.

Q. But it was the custom in laying all asphalte pavements under any contract by any contractor that his material should come up to gauge used, such as was used in your case, was it not?

A. You state it was. I never saw it done on any work that we did, so that I do not know that it was done.

Q. It would look to me that it would have to be done to make it uniform. How would you do it, then, without a gauge?

A. We had a gauge that we made, so that when we made a pavement it was compressed down to quite a number of inches before this gauge was used. We had used our gauge in the same way on the contracts we had before we had this one, so that it would compress down to the two inches.

Q. Is it not customary to use the same kind of a gauge in constructing these streets?

A. I do not know anything about it. I do not know what they are doing now.

Q. Did you ever know a pavement to be laid without a gauge of some kind?

A. I will state now, then, if it is in place, that I have been on the street when they were laying this pavement and the inspector compelled us to lay this so that the gauge would sink into it a half an inch, and I would also state at that time that we have laid pavements in this city when I never knew that the District Commissioners had a gauge of that kind.

Q. Do you not think, as a contractor and constructor of pavements, that a gauge is essential and necessary?

A. Not necessarily so. You take a straight-edge and lay on your pavement and have it extended over and you can cut the edge down and see.

Q. But that is nothing more or less than a gauge?

68 A. It is necessary to have something to tell.

Q. It is necessary to show your level—your grade on your street?

A. Yes, sir; it is—that is, we have always used that in our business.

Q. You never have constructed a pavement of that kind anywhere without using some kind of a gauge, have you?

A. I have not; but we did not have a gauge cut out in that shape.

Q. But you used some kind of a gauge?

A. Yes, sir.

Q. Now, when you were constructing these streets had you any idea that that was going to make a half an inch difference?

A. We certainly knew, as we were aware of just about what it was making, and, of course, it would be a little bit higher in some places than others, and it did run up to four inches in some places.

Q. Would it make very much difference in the material?

A. It would make a great difference in the cost of the material.

Q. In the cost of the extra amount used?

A. Yes, sir; in the extra amount used.

Q. Would it take a very great extra amount for that?

A. It would take to lay a half an inch more—it would take one-fifth more at least in material.

Q. Whether that pavement would come down to the level you claim that it ought to come—would not that depend upon the weight of the roller?

A. I was allowing for the fact that for our own benefit we had—that for our own benefit we had rolled it properly, and we did do that with the thirteen-ton roller on it. If you lay a less amount on the street, it would compress down to a smaller amount; if laid more, it would compress down to more.

Q. Now, I understand you to say that you claim for another kind of extra work, such as sewers. What is that?

A. Sewer traps, basins connecting sewer traps, digging trenches.

Q. Along the street?

A. Yes, sir; along the street.

Q. Was that extra work under your contract?

A. Well, only as they ordered it to be done. It was not under the contract as I should understand it.

Q. You regarded that as extra work, outside of the estimated work embraced in the contract?

A. Very decidedly.

Q. Now, tell us what did you do about the sewer there. What work did you do about the sewer?

A. Well, we did not lay a whole sewer.

Q. How much of a sewer did you lay?

A. How many yards I do not remember. I know it came to quite a number of days, and there was quite a number of them to lay—that is, connections with sewers for a catch-basin.

Q. You did not construct the sewer?

A. Not the main sewer and connections with them.

69 Q. Then the work was connecting sewer and setting trap basins that you did?

A. Well, yes, sir; it was laying oftentimes ten and twenty feet.

Q. Of what?

A. Of sewer pipe.

Q. For the main sewer?

A. Yes, sir.

Q. Well, now, do you know how much of that you did, in detail?

A. I do not remember the detail of that.

Q. Who ordered you to do that?

A. The Engineer Commissioner himself ordered it.

Q. I want your personal knowledge. Who ordered you to do *do* it?

A. The Engineer Commissioner.

Q. Do you know that he ordered you to do it?

A. I did not hear him order it.

Q. Then, you do not know, do you?

A. Taking it on that ground, I do not know that because I did not hear him say so, but I saw orders written at times.

Q. Who signed the orders?

A. I do not remember that.

Q. Then, you do not know what the orders were; if you can give us your personal knowledge I have no objection, otherwise I want to know whether you know that that extra work laying these pipes, sewer traps, etc., was ordered by any officer of the District government. If you know it, say so.

A. Well, I know it was paid for as extra work, but I had not seen the work ordered.

Q. This was all paid for as extra work, was it?

A. Yes, sir.

Q. And made a part of the $36,000?

A. Yes, sir.

Q. Then, in this case you make no claim for extra work in regard to sewers or traps or anything of that kind that you have just been talking about?

A. No, sir.

Q. Then, in this case you only make a claim for extra work, to wit, the one-half inch extra surface of pavement as laid by you; that is all the extra work you make claim for, is it not?

A. Yes, sir.

Q. In this case?

A. Yes, sir; that is right.

Q. And how much did you say that that extra work was worth—for the one-half inch?

A. It is worth a little over $6,000.

Q. How did you estimate that?

A. I have the contract, and as that is a half an inch, the contract price being 95 cents, I divided that by five, then I multiplied it by the 32,000 yards that we had finished. One-fifth of ninety-five is nineteen and that makes a little over $6,000.

70 Q. Would it not be worth less to put that extra half inch than other portions of the structure?

A. Well, we would not do it for any less; I do not think it was worth any less.

Q. I asked you if it would not cost less to do that one-half inch than other portions of the road constructed.

A. It would cost, perhaps, a very trifle less, but the most of it would be the same. The labor on the street would be a little bit less. It would be but a fraction, but I have allowed for a difference there in the estimate for at least three cents a yard for what I figured on the other.

Q. Well, now, you claim your other item is for damages on the contract for not being allowed to fulfill the contract, is it not?

A. Yes, sir.

Q. And it is only the two items that you claim for?

A. I thought that there was three.

Q. What three?

A. I understood that the claim was for the one-half inch and the claim for the contract, and also for the loss of machinery.

Q. What claim do you mean on the contract?

A. The claim on the unfinished portion of the contract.

Q. That is another question—that is for damages on your contract—breach of contract; so that there is really only two items—that is, this one-half inch and your damage for breach of contract?

A. Yes, sir.

Q. Well, now, will you tell us how that could be a breach of contract on the part of the District, if you were to perform it in 120 days and did not perform it in for 230 days? What would your profits have been on the balance that you would have received over what you had been paid?

A. We would have made $5,000 on the balance of the contract on the $14,000 that we were to have done.

Q. The one-third you mean?

A. Yes, sir.

Q. That is, if you could have done it?

A. Yes, sir.

Q. You mean over and above the material and everything else?

A. Yes, sir; that would have been net.

Q. Then you must have made some money on the two thirds that you did do?

A. We did.

Q. How much did you make on that?

A. Well, I should judge about $10,000; ten or twelve thousand dollars, at least.

Mr. JOHNSON: I would like to ask you what is the thickness of the asphalte pavement that you put on these streets when pressed?

A. That was three inches in all. There was to be a half an inch of——

Q. I see the contract says asphalte two and one-half inches when compressed.

71 A. Yes, sir; and we laid three inches.

Q. By whose authority did you lay the additional half inch?

A. Because we had to lay it up to that gauge furnished by the District Commissioners to us.

Q. But your contract says it was to be two and one-half inches in thickness.

A. Yes, sir; and consequently that gauge should have been a lower gauge to compress it to two and one-half inches. That is just where we object to it.

Q. Well, you knew that you had contracted for two and one-half inches asphalte in thickness compressed, and you knew further that if you make it a half an inch more it would cost you more money. Why did you not comply with the contract and make it two and one-half inches instead of three?

A. That is what we tried to do, and they would not allow us to do it.

Q. They only wanted two and one-half inches, did they not, according to the agreement?

A. According to agreement, that was all that was wanted.

Q. And you made it three inches?

A. We made it three inches because we were obliged to.

Q. How were you obliged?

A. They cut us a gauge, which the inspector on the street made us lay it above the gauge so that it would sink into it.

Q. So that it was impossible to make it two and one-half inches under the arrangement that compelled you to lay the asphaltum?

A. Yes, sir.

Q. Did you tell them so?

A. We did; yes, sir.

Q. Who did?

A. Dr. Hamner was on the street as foreman, and he and my father and myself protested against it. I did not do it as often as they did, but I did protest against it and sat there and fought against the inspector.

Q. Who was the inspector there?

A. George Scharff—that is, he was inspector on the street.

Q. There is one thing I would like to ask you, and that is this: I want to get clearly into my mind how much of the estimated contract work under that contract did you do and how much did you leave unfinished.

A. That was 32,000 yards, and 14,000 yards left unfinished.

Q. Were you paid for the amount of the 32,000 yards estimated work under that contract?

A. They made us payments for that; yes, sir.

Q. And in addition were you paid anything for this extra work that you have mentioned—this one-half inch of asphaltum?

A. We were not; no, sir.

Q. About how much of the estimated work was done under the contract?

A. About two-thirds of it.

72 Q. Leaving unfinished about one-third?

A. Just about one-third. I should think it would be a little over one-third. I had no actual figures—about 14,00- yards; but, if we had finished that part of the work, my experience is that it would have run over 14,000 yards. It would have been at least 16,000 yards that we would have done, and we had the stock on hand to do it.

Q. Did you buy this machinery for this contract?

A. The bulk of it was bought for this contract.

Q. And you had a lot of it for other contracts in case you should obtain contracts. You were ready to go on with them?

A. We had a very small part of it only. We had a small part of the machinery left from the first contract.

Redirect examination by Mr. WILLIAMSON:

Q. If you had not been stopped by the Commissioners and had been allowed to go on with your work and finished your contract, would you have been in a position to take other contracts?

A. We would.

Q. You have stated, then, that you would have been in a position to take other contracts. Were you in a position after that?

A. We were not.

Q. Why?

A. Because the material at the factory, the machinery, and the stock were mixed up in litigation on account of not carrying out this contract.

Mr. HAZELTON: In other words, you had not the capital to do your business?

A. We had not capital enough to lay in a large stock for this contract of six or seven thousand dollars and machinery and then not use it. There was plenty of capital to have carried the contract on if we had not been stopped.

Q. Do you know how many thousand yards were in contract 222 when you undertook the work?

A. We did, or just about; it was very close.

Q. How many?

A. About 46,000 yards in the contract. I figured on two or three thousand yards more to provide stock for, as we had to bring it from the island of Trinidad and it would not do to run short.

Q. Did you supply yourself with stock and material to do that work?

A. We did.

Q. How soon after you got the contract?

A. Shortly afterwards. Just the exact date I do not know, but just as soon as we could get the machinery and start.

Q. Well, do you know how many yards you finished under the contract?

A. I do.

Q. How many?

73 A. 32,000 yards or a few short of that.

Q. Were you paid for it?
A. We were.
Q. What was the balance unexecuted?
A. 14,000 yards.
Q. This you know of your personal knowledge?
A. I do.
Q. Why did you not finish that?
A. Because we were stopped by the Commissioners.
Q. Why did they stop you?
A. They claimed for the want of money.
Q. Want of money?
A. Yes, sir. The money appropriated by Congress for this contract they claimed was gone.
Q. Do I understand you to say that Congress made a special appropriation for this particular contract?
A. Not for this contract, but for this class of work. There are other contracts in the appropriation. There was $100,000 appropriated and we would have had about $40,000 of it.
Q. Was this appropriation specific what the money was for?
A. Yes, sir.
Q. What?
A. For the repair of concrete pavements.
Q. Mr. Bailey, you have testified that you had 120 days in which to do this work. Why did you not complete it within that time?
A. Well, we were delayed by doing extra work. We could have completed it, for we had had the machinery ready and complete the day the contract was signed.
Q. What extra work?
A. Such as digging sewers and connecting with sewers the sewer basins and that class of work, and that was not figured on at that time.
Q. Did the Commissioners complain of your not having completed your contract within the time?
A. Not that I know of.
Q. Did they rescind it for that cause?
A. No, sir; they did not.
Q. Did they put Mr. Bailey on the defaulting contractors' list because he did not do it?
A. They did not.
Q. Then the only reason that you know of for the rescinding of this contract is because of the failure of the appropriation?
A. That is the only reason.
Q. Did they accept the work which you had done?
A. They did after a hard fight.
Q. Pay you for it?
A. Yes, sir.
Q. The only objection that you heard of was the failure of the appropriation?
A. That is the only objection.
Q. Do you remember the time that you were laying this

74 pavement—did you have any trouble with the Commissioners or inspector whereby you were impeded in this work?

A. We did. They were continually fighting us—in fact, if we had not fought them continually they would have spoiled the pavement.

Q. Did you have any test made of the pavement?

A. We did. They condemned 200 yards of it up on New Hampshire avenue, and they took it down to the Commissioners' office and compared it with the good work and they had to accept it. The inspector there was fighting me all the time.

Q. Did that trouble which they caused you then impede the progress of your work?

A. It did.

Q. Did they at any time hold back any of your money?

A. They did.

Q. How much?

A. About $5,000.

Q. Why did they hold that back?

A. They claimed that they should hold it back.

Q. Well, if you know any reason why, just state what claim they made.

A. Well, they claimed that they should hold it back—ten per cent. of it, the same as any new work. In new work they held ten per cent. until the guarantee is up.

Q. How long did they hold that ten per cent.; do you know?

A. Until September, 1882.

Q. Was it finally given to you?

A. It was.

Q. How came that about? Look at that letter.

A. Just by the decision of that letter of the acting comptroller of the Treasury Department.

Mr. WILLIAMSON: That letter is offered in evidence as Exhibit "C."

Q. After the letter was received they handed you the money?

A. They did.

Q. Did the withholding of that money from you cause you any damage or delay?

A. It did.

Q. State what.

A. Prevented us from paying for this machinery and stock and saving it from litigation and caused the loss of it. It was used up in that litigation. If we had had the money we could have held the machinery and been ready for other contracts.

Q. How much did I understand you to say that ten per cent. amounted to?

A. Just about $5,000.

Q. And how long did they hold it?

A. Until September, 1880 or 1882, I should say; September, 1882—I am positive about that.

Q. Well, that does not give me the exact length of time.

75 A. Well, from February 12th, 1880, until September, 1882.
Q. A little over two years?
A. Yes, sir.

Cross-examination by Mr. HAZELTON:

Q. On what points was it that the inspector had hindered you and embarrassed you, as you state, in carrying on this work; on what points did he make—in what way did he interfere?
A. He tried to make us screen the asphalte through finer screens than it could be screened through. He tried to have the sand hotter than was necessary to have it, and it took a great deal more time to heat it than was necessary.
Q. Do you think that he did that intentionally?
A. I believe that he did. I always felt so, and they found that they could not possibly screen the asphalte through this fine screen.
Q. Tell us what reason you can assign for that. Was it a malicious desire to burn up your machinery?
A. As I believe, he was working for the interest of the ring at that time to break us down.
Q. They had adverse interest to you in the same interest?
A. Yes, sir; they had.
Q. You only knew that as you surmised from his actions?
A. As I believed, from his actions, and that directly after he got through with the contract he went to work for Barbour.

Subscribed and sworn to before me this — day of ——, A. D. 1892.

—— ——.

Mr. WILLIAMSON: I now ask to put in the affidavit—the deposition as it is marked—of E. T. Hamner in this case.
Mr. Hamner was the superintendent of the streets under this contract 222 for Bailey and was the most important witness we had. We brought him on here from the West to testify in this case and he died. This is his deposition, taken before the District Commissioners, sworn to by their officer, and I desire to offer this in evidence, and I have an affidavit here, which I have made, of my own, which I will read.
The affidavit appears to be as follows:

Mr. HAZELTON: I move to strike out all the testimony of the witness as to the claim for damages or pay for extra work performed, to wit, the one-half extra inch for surfacing, upon the ground that such testimony is at variance with the allegations of the complain*ant*, and that such testimony is inadmiss*a*ble under the allegations of the complai*ant*, there being no allegations therein as to the same, and I move to strike out the testimony as to the damages, the same not being properly laid and alleged in your complaint in this action.
Mr. WILLIAMSON: To that I have to say that there is an allegation claiming about $6,000 for the one-half inch of surfacing
76 which was laid for the pavement under contract 222 by the

Bailey French Paving Company, and that said allegation do- appear in your papers of the case at law No. 24279.

The plaintiff hereupon announced his case as closed in chief.

94072, L. R.

(Copy.)

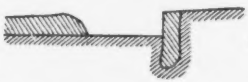
A.

Letter referred to in my affidavit of this date, April 11, 1892.—Francis V. Greene.

WASHINGTON, D. C., *March* 10, 1883.

Major G. J. Lydecker, corps of engineers, U. S. A., Engineer Commissioner D. C.

MAJOR: In the matter of suit of D. W. Bailey for $20,000 damages for non-fulfillment of contract, I have the honor to make the following report as a basis for defence:

On the 30th of July, 1879, a contract was awarded to the Bailey French Paving Company, per D. W. Bailey, agent, for resurfacing certain streets, copy of contract herewith. The estimated amount of work was 45,537 square yards, on which the contract price varies with different streets from 82 cents to $1.05 per square yard, amounting to $40,950.86 in all. The conditions of the contract required the contractor to do any extra work that might become necessary in consequence of change of plans during the progress of the work. Such a change became necessary. It had been originally intended to stop the resurfacing within about two feet of the gutter, leaving a beveled edge,  and between this and the curb the old pavement was not to be touched. Where the old pavement showed a sufficient amount of curb to take the new pavement it was intended to lay the new pavement up to the curb. It was found, in fact, that in very few cases was there enough showing of curb to admit a new pavement, and that the proposed beveled edge would not be durable. Another plan was therefore adopted and the contractor notified to execute it. He made no protest, so far as I am aware, and did execute it. This plan was to cut out the old pavement for a sufficient width from the curb, excavate a certain amount of earth under it so as to lower the grade, and then lay an entirely new pavement in the gutter. For this the contractor was paid at fair rates, much more remunerative, in fact, than his rates for resurfacing.

This extra work on this contract and others for similar work increased the cost of all resurfacing done in that year. The appropriation being for a specific amount of money, the Commissioners had no discretion to go beyond that amount, and of course the amount of work had to be reduced. Mr. Bailey

77

was therefore notified on February 12, 1880, that so much of his contract as applied to Mount Vernon square, from 7th to 9th streets west, and Pennsylvania avenue from 6th to 8th streets east was revoked, as the Commissioners would have no funds to pay for these streets. This is the entire history of the transaction. Owing to a necessary change of plan, a portion of the work had to be omitted for lack of funds to pay for it.

The item of $20,000 damages is simply preposterous. The whole amount of his contract was only a little more than $40,000, and he executed about three-fourths of it as originally designed, the amount revoked being only about $10,000. On this latter amount he was to make a profit of $20,000, if his statement of damages be correct. In fact, however, Mr. Bailey was paid $5,748.14 for his extra work, making the total amount received by him under his contract $35,963.18 against an estimate- amount, when the contract was signed, of $40,950.86. The difference of about $5,000 is not unusual as between the estimated and actual amount of work. Mr. Bailey was paid in full for all work done by him and at the rates named in the contract which he voluntarily proposed and signed.

If this suit is pressed, attention should be drawn to the fact that Bailey did not execute his part of the contract. He contracted to finish all the work in 120 days from July 30, 1879. In fact, he did not complete so much as he was allowed to execute in less than 230 days from July 30th, to wit, on or about February 20, 1880, and thereby subjected the District to great annoyance and to positive loss in the employment of inspectors for a longer time than was absolutely necessary for the work.

Moreover, the work was in places badly done and was not kept in repair, as agreed upon in the contract by said Bailey, so that the District was forced to make repairs at an expense of $1,312.30, for which, I believe, suit is now pending against said Bailey. The papers were sent to the attorney about a year ago.

Very respectfully,

(Signed) F. V. GREENE,
Captain Engineers, U. S. A.

A true copy.

G. J. FIEBEGER,
Capt. of Engineers.

It was agreed that this letter should be received in evidence and have the same force and effect as if Capt. Greene had testified to the facts therein under oath.

J. J. JOHNSON, *Referee.*

MARCH 10, 1883.

Forwarded to Engineer Commissioner D. C., with statement of facts necessary for a defense.

78 These papers were received by Commissioners D. C., and appear on their L. R. Book as referred to the attorney D. C. in April, 1883.

NOTE.—When the foregoing bill of exceptions was presented to the court for signature the counsel for the District of Columbia stated that when they offered in evidence the report of J. J. Johnson, which is a part of the record in the case at law No. 24279, they understood that the papers annexed to the finding of the referee—purporting to be the evidence in the case before him and returned by him with his findings under one and the same cover, marked by him "Report of referee"—were part of the report, and were included in the offer made by them. Counsel for Mrs. Bailey stated that they did not so understand it, but understood that only the report proper was offered. No part of the papers purportiug to be evidence was in fact read in evidence to the jury, the case being submitted without argument. The presiding justice is of the opinion that the evidence, so called, is not a part of the report and was not included in the offer; but in order that the District of Columbia may be able to present this question to the Court of Appeals, the evidence in question is appended hereto and marked Exhibit "A" and made part hereof.

L. E. McCOMAS, *Justice.* [SEAL.]

Supreme Court of the District of Columbia.

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 142, inclusive, are true copies of originals in causes Nos. 24279 and 34564, at law, consolidated, wherein Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased, is plaintiff and The District of Columbia is defendant, as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, District of Columbia, this 28 day of May, A. D. 1896.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 584: Elizabeth L. W. Bailey, adm'x, appellant, *vs.* The District of Columbia; and No. 585: The District of Columbia, appellant, *vs.* Elizabeth L. W. Bailey, adm'x. Court of Appeals, District of Columbia. Filed May 28, 1896. Robert Willett, clerk.

79 THURSDAY, *October 15th, A. D.* 1896.

ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 584.

and

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased. } No. 585.

The argument in the above-entitled causes was commenced by Mr. S. T. Thomas, attorney for the District of Columbia, and was continued by Mr. A. S. Worthington, attorney for Elizabeth L. W. Bailey, administratrix.

FRIDAY, *October 16th, A. D.* 1896.

ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 584.

and

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased. } No. 585.

The argument in the above-entitled causes was continued by Mr. A. S. Worthington, attorney for Elizabeth L. W. Bailey, administratrix, and was concluded by Mr. A. B. Duvall, attorney for the District of Columbia.

80 ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 584.

and

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased. } No. 585.

Mr. Justice MORRIS delivered the opinion of the court:

These two cases have reference to the same subject-matter of controversy, and were consolidated for trial in the court below.

On February 24, 1883, Davis W. Bailey instituted suit at common law in the supreme court of the District of Columbia to recover

damages from the District of Columbia, for the alleged violation by the latter of a contract between the District and himself, whereby he (Davis) had agreed to repair with asphalt the surface of certain streets in the city of Washington, and the District of Columbia had agreed to pay him for the same. The burden of his complaint was that, while he was proceeding with the work, he was prevented by the Commissioners of the District from completing it; and that they had refused to pay him his money, as required by the contract.

The District of Columbia denied its liability, and contested the suit, during the pendency of which and before any trial of the issue between the parties, the plaintiff died, and his administratrix, his widow, was substituted as plaintiff in his place (January 14, 1885).

No progress seems to have been made in the case until September 16, 1891, when one of the attorneys for the plaintiff addressed a letter to the Commissioners of the District, in which, after having recited the substantial facts of the controversy, he added: "I write to ask if you will appoint some good man as a referee or arbitrator to whom this case may be referred, with power to hear the evidence and make an award which shall be accepted, whether for or against us, as a final settlement of this long and much litigated case." No immediate action seems to have been taken by the Commissioners on this letter; but there were frequent interviews between them and the attorney for the plaintiff, in which the suggestions of the letter were reiterated by the latter and the Commissioners were urged to name any person whom they pleased as referee, with the distinct understanding that his award should be final, as is claimed by the attorney. The Commissioners finally acceded to the suggestion; and under date of January 11, 1892, they made this order upon their records:

"Office of the Commissioners of the District of Columbia.

WASHINGTON, *January* 11, 1882.

Ordered, that J. J. Johnson is hereby appointed referee in the matter of the suit of Bailey, administratrix of Bailey, deceased, *vs.* District of Columbia.

Official copy.

By order:

W. TINDALL, *Secretary.*"

This order was communicated to the plaintiff's attorney; and thereupon the parties by their respective attorneys, and with their witnesses, appeared before the referee, J. J. Johnson, Esq., who entered upon his duties as such, took testimony, and proceeded to make his award. In it he found that there was due from the District of Columbia to the plaintiff, on account of the contract which formed the basis of the suit, the sum of $10,519.20, which was composed of two items, one of $4,440.15 for the profit of the unexecuted balance of the contract, and the other of $6,079.05 for an enlargement of the contract which required the resurfacing of a larger area of the streets than had originally been intended, for which a claim was made under an amended declaration filed with the consent of the attorneys

of both parties. The report of the award the referee filed in court, or in the clerk's office, entitling it in the case, which he did without consultation with either party; and with the report were some papers containing fragmentary portions of the evidence taken before him, which he subsequently testified he had taken for his own guidance, and had not reduced to the condition of formal deposition. The filing of the report was on July 18, 1892.

It should be noted that there was no order made by the court at any time, either before or after the action by the referee, referring the cause to him.

On September 23, 1892, exceptions to the report of the referee were filed by the District of Columbia on the ground of excessive damages, insufficiency of evidence, and errors of law, the attorney for the plaintiff waiving objection for lapse of time.

Again the case rested until March 10, 1893, when the plaintiff, by a new attorney, moved for judgment on the award. But what further action, if any, was taken in the case, until the cause was consolidated for trial with another suit subsequently instituted, does not appear from the record before us.

Proceeding upon the theory that the reference of the cause by the parties to Mr. Johnson was a submission to arbitration, and that the award was binding upon both parties as that of an arbitrator, and was not a mere reference under statute to aid the court in reaching a judgment, the plaintiff, on August 8, 1893, assuming that the first suit had been discontinued by the reference to arbitration, instituted a suit upon the award. To this the defendant pleaded that there was no award; that the alleged award was not under seal, and had never been delivered to the defendant; that there never was any agreement to submit to arbitration; that the former suit was yet pending, and that the defendant was never indebted and had never promised as alleged.

When the cause was ready for trial, motion was made on behalf of the plaintiff for its consolidation with the previous cause "for trial at the same time and by the same jury," and the motion was granted over the opposition of the attorney for the District, who, however, took no exception to the ruling, so far as the record discloses.

At the trial the plaintiff proved and offered in evidence the letter heretobefore mentioned, proposing the submission of the case to a referee, and the order of the Commissioners of the District appointing J. J. Johnson, Esq., as referee. She then adduced testimony in regard to various interviews, subsequent to the date of the letter, between her attorney and the Commissioners, tending to show
81 that the agreement between the parties was for a final arbitration, and not merely for reference for report to be made to the court. Several objections were made to this oral testimony on behalf of the defendant on the ground that the agreement between the parties was in writing, and that its terms could not be varied by oral testimony. But these objections were overruled, and exception was duly noted.

Then the plaintiff offered in evidence the report or award of the

referee, which was admitted over the objection of the defendant. For this objection two grounds were assigned: 1st. That all the papers and evidence that appeared to have been attached to the report should have been offered with it, if it was offered at all; and, 2d, because the referee was without authority to make an award. To the ruling of the court exception was reserved. This was the substance of the plaintiff's evidence in chief. The defendant then introduced oral testimony tending to show that the reference to Mr. Johnson was not intended to be an arbitration; and also offered in evidence the record and proceedings in the first cause, the purpose being apparently to get in not only the referee's report, but also all the papers that had been attached to it, or delivered to the clerk with it. Some confusion or misunderstanding seems to have resulted in this connection. There was a colloquy between counsel as to what was intended to be included in the offer, counsel for the defendant stating that he meant to offer "the record in the first case;" then again, "the declaration, pleas, and everything else;" and again, "the report of Mr. Johnson, the exceptions to the report, and the motions to confirm the report." Strangely enough, the record before us does not show whether this record and proceedings, or whatever it was, that was offered in evidence, was admitted by the court or refused. There is nothing to show the ruling of the court upon it. But as no exception appears on the record to have been taken by either party, it must be assumed that the action of the court in that regard was satisfactory to both.

But in the course of the preparation of the bill of exceptions, a controversy arose before the judge as to whether the evidence, or what is called the evidence, alleged to have been attached to the referee's report, was included in the offer. After stating the misunderstanding of counsel as to the matter, the justice who tried the case says, in the bill of exceptions:

"No part of the papers purporting to be evidence was in fact read in evidence to the jury, the case being submitted without argument. The presiding justice is of opinion that the evidence so called is not a part of the report and was not included in the offer; but in order that the District of Columbia may be able to present this question to the Court of Appeals, the evidence in question is appended hereto and marked 'Exhibit A,' and made part hereof."

There was testimony in rebuttal by the plaintiff, and both parties then presented prayers for instructions to the jury. The plaintiff requested one, which was granted, and the defendant five, two of which were granted and three refused.

The plaintiff's prayer was, in substance, that if, in fact, an arbitration was intended by the reference to Mr. Johnson, the jury should return a verdict for the plaintiff. To the granting of this the defendant excepted.

Of the two prayers granted on behalf of the defendant, one was for a peremptory instruction to the jury to return a verdict for the defendant in the first case, on the ground apparently that there was nothing to support the declaration. Exception to this was noted by the plaintiff, for the avowed purpose merely of preserving her rights

in that case in the event that she should not succeed in the second. And the second prayer granted on behalf of the defendant was the converse of the plaintiff's prayer, and was to the effect that, if the jury found that by the reference to Mr. Johnson only a reference for report to the court was intended, their verdict should be for the defendant. Of the three prayers refused, one contemplated a peremptory instruction to the jury to return a verdict for the defendant in the second case; another, that the Commissioners had no authority to agree to an arbitration; and the third, that the plaintiff, as administratrix, had no authority to submit to an arbitration.

It is presumed that exception was taken to the action of the court on these prayers, but it is one of the peculiarities of this very peculiar case, that what purports to be the bill of exception in this regard is without date and does not purport to have been signed by the trial justice or by any justice. And there would seem to be some reason to doubt whether the bills of exception or any of them were signed in due time; but no point is made in this regard by the appellee.

The court proceeded to charge the jury of its own motion; and the charge is contained in full in the record, and there is what purports to be a bill of exceptions to some portions of it, specified to be "such parts of said charge as are contained within brackets." Yet the record shows no brackets, and there is nothing whatever to indicate the parts of the charge to which exception was taken.

The jury rendered a verdict for the plaintiff for the amount claimed, being the sum of $10,519 20, as found in Mr. Johnson's award, with interest thereon from July 18, 1892, the day on which the report was filed. And upon this there was judgment entered, from which the defendant has appealed to this court. The plaintiff, also, has appealed from the judgment entered in the first case, which was for the defendant.

Errors, nine in number, are assigned by the defendant, as follows:

1. In consolidating the two cases.

2. In admitting oral testimony to show that the intention of the parties was to submit the case to arbitration, the agreement of the parties being in writing.

3. In admitting in evidence the report of the referee, without including the papers and evidence attached thereto and filed therewith by the referee as part of his report.

4. In excluding from the consideration of the jury the evidence attached to and forming part of the report of the referee.

5. In holding that the report of the referee was admissible in evidence as an award.

6. In granting the plaintiff's first prayer.

82 7. In refusing to direct a verdict for the defendant.

8. In refusing to grant the defendant's third prayer, that the commissioners were without authority to agree to submit the matters in controversy to the final award of an arbitrator.

9. In refusing to grant the defendant's fifth prayer, that the plaintiff, as administratrix of her deceased husband, had no authority to agree to submit the claim to arbitration.

We are unable to find any substantial support in law for any of the propositions involved in these assignments of error, in view of the facts of the cases under consideration.

The first assignment is palpably untenable.

The trial of the causes at the same time and by the same jury was a matter within the discretion of the trial court, and plainly not a subject for appeal to an appellate tribunal. Counsel for defendant have failed to point out wherein any injury has accrued to the defendant, or wherein the defendant has been deprived of any right of defense or other right by the consolidation. And plainly it has suffered no damage whatever by that action of the court.

Counsel for defense have likewise failed to support, either by argument or by authority, their proposition that it was not competent for the parties, or for either of them, to submit their controversy to arbitration. The contrary proposition seems to us to be consonant with reason, and sustained by the great preponderance of authority. In the absence of statutory prohibition or other conventional disqualification, the right to submit to arbitration is as broad as the right to sue and to be sued. Dillon on Mun. Corp., sec. 478; Alexandria Canal Co. *v.* Swan, 8 How., 83; Township of Walnut *v.* Rankin, 70 Iowa, 65; Sisson *v.* Mayor of Baltimore, 51 Md., 83; Ebert *v.* Ebert, 5 Md., 353; Lyle *v.* Rogers, 5 Wheat., 406; Dickey *v.* Sleeper, 13 Mass., 244; Wood *v.* Tunnicliff, 74 N. Y., 38; Bean *v.* Farnam, 6 Pick., 269; Alling *v.* Munson, 2 Conn., 691; Barry *v.* Rush, 1 T. R., 691; Bacon's Abridgment, Art. C.; and 2 Williams on Executors, 1800.

That the parties, therefore, were competent to enter into articles of arbitration for the determination of their controversy, if they did so enter, we regard as being beyond reasonable question or doubt. And this leads at once to the substantial question in this case, the inquiry whether the parties did in fact agree to submit such controversy to arbitration, and whether, pursuant to such submission, there was an award rendered which became binding on both parties.

Whether the parties agreed to enter into arbitration is a question of fact for a jury. The principal issue raised by the pleadings in the second suit is, whether there was such an agreement, and a submission in pursuance thereof. Such an agreement, if it existed, may have been in writing or may have been oral. The defendant claims that the agreement, whatever it was, is contained in the letter of the attorney to the Commissioners proposing it and the order of the Commissioners made in pursuance of that letter; and therefore it objected to the introduction of oral testimony. But plainly these documents do not of themselves constitute an agreement. The order of the Commissioners does not refer in terms to the letter of the attorney and does not purport to have been made in pursuance of it. Oral testimony was admissible to connect the two, and to show the transactions between the writing of the letter and the making of the order. The letter and the order are only parts of the contract, not necessarily referable one to the other, and it was proper to show the connection by oral evidence. It is plain from the rec-

ord that the agreement for arbitration, if such an agreement there was at all, was, in contemplation of law, only an oral agreement, whereof some of the steps or component parts were in writing or to be evidenced by writing. It necessarily follows, therefore, that oral testimony was proper in proof of it; and it follows likewise, as there was conflicting testimony on the subject, that this was an issue proper to be submitted to a jury, and should not have been withdrawn from them, as prayed by the defendant. For the question is not, as counsel for the defendant in their argument would seem to imply, one of the construction and effect of the records of the court. The agreement for a reference never became a record of the court. It was wholly an extraneous transaction between the parties. Whether the report of the referee, made in pursuance of the reference, became a record of the court, is a very different question, and one which only enters as one element of proof into the determination of the issues in the case.

But even if the contention of the defendant were correct that the entire agreement between the parties is evidenced by the letter of the attorney and the order of the Commissioners, it is not apparent that this helps the defendant's cause. For if the agreement consists of these two documents, then the order of the Commissioners would necessarily have to be construed with reference to the letter of the attorney, the offer of which was in specific and distinct terms, for an arbitration that should be a final settlement of the controversy. An order that could not be construed as an acceptance of that offer could not constitute an agreement. And if these two papers constituted all the agreement, and the construction of them as such must be as here indicated, it is very plain that oral testimony to the same effect, even if inadmissible, could not have prejudiced the defendant.

The third assignment of error is based on the admission in evidence of the referee's report, when introduced by the plaintiff, without including the papers and evidence attached thereto and filed therewith by the referee as part of his report. This assignment is wholly untenable. Counsel for defendant claim to have themselves introduced these papers and evidence also; and if their claim be correct in that regard it is not apparent how any injury was done by the failure of the plaintiff to introduce them. But counsel for plaintiff were plainly right in excluding these papers and evidence, so called, from their offer.

The "papers and evidence" referred to are merely fragmentary portions of the testimony taken before the referee, or taken by him, as he says, for his own information—some of it consisting of letters admitted instead of depositions, and much of it merely notes
83 of oral testimony never read to the witnesses and never signed by them or in any manner reduced to deposition. These "papers and evidence" do not purport to be all the testimony that was adduced before the referee. On the contrary, it distinctly appears that they do not constitute the whole testimony so taken, and that important portions of the testimony were omitted therefrom. Nor is it true that these "papers and evidence" were

attached by the referee to his report, or that they were filed by him as part of his report. Nowhere in his report does he refer to them; and there is nothing in the record of the cause in which they were filed to show that they had any connection whatever with the report beyond the fact that they were filed on the same day with the report.

Manifestly to permit such fragmentary and unauthorized "papers and evidence" as these to be introduced in evidence in the second suit, whether offered by the plaintiff or by the defendant, would have been highly improper. They were not admissible in the case under any circumstances or for any purpose. If the testimony taken before the referee was proper at all to be introduced in evidence in this case, it should have been the whole testimony, and not merely fragmentary and detached portions of it.

But we are of opinion that this testimony was not admissible at all in the premises. The testimony is no part of the award of an arbitrator; nor is it any part of the report of a referee, unless specifically so made by the report itself, or it has been directed by the order of reference to be returned to the court. This we regard so well settled as to need no citation of authority in support of it. We presume that no authority can be found in opposition to it. It is the duty of a referee to report facts, not the testimony by which such facts are established. He is in a measure substituted for a jury, and his findings are equivalent to their verdict. The functions of an arbitrator go beyond this. He finds the facts and adjudicates the claims of the parties. It is very clear, therefore, that, unless the testimony has been in some way incorporated into the report of one or the award of the other, it constitutes no part of either.

The fourth assignment of error consists in the alleged exclusion from the consideration of the jury of the evidence attached to and forming part of the report of the referee. What we have said in regard to the third assignment will serve to dispose of this assignment also. Moreover, we must take the statement of the presiding justice, which we may add is corroborated by other parts of the record, that this alleged evidence was never offered in this case, as correct; and it follows, of course, that there could have been no exclusion from the consideration of the jury of that which was never offered for their consideration.

Much argument is expended on behalf of the defendant to show that from the evidence the referee's award or finding was not warranted. But the evidence taken before the referee was not before the court below, and is not before us; and no inference whatever of the propriety or impropriety of the award can be drawn from it. That award or report, whichever it be or be called, must be judged by its own findings of facts and its legal conclusions therefrom, and not by any extraneous testimony.

The fifth, sixth and seventh assignments of error raise simply the question whether the referee's determination was an award based upon an agreement to submit to arbitration, or only a report to the court for its information requiring action by the court thereon to

give it vitality. And this question, of course, depends for its solution on the character of the agreement between the parties, if agreement there was. As we have already indicated, there is no record of the court to determine the matter; and the question becomes one of fact to be determined by a jury, which it was not competent for the court, under the condition of the proof, to take away from them by a peremptory instruction. We think that it was properly and fairly submitted to the jury by the court.

The question is not whether the referee's report is correct or not; but whether there was an agreement to submit to arbitration, an actual arbitration in pursuance of it, and an award thereupon by the arbitrator. These are all matters of fact for determination by a jury; and they have all been resolved by the jury in favor of the plaintiff. We would not be disposed to question the justice of their verdict, even if we had the right so to do. The argument upon the merits of the plaintiff's original claim, even if it were well founded in fact, has no place in the discussion before us. If we could admit such discussion, arbitration and award would be a farce, and even reference to a referee under statute or rule of court would be a meaningless formality.

We are of opinion that there is no error in the record; and that both of the judgments appealed from should be *affirmed with costs. And it is so ordered.*

84 TUESDAY, *November* 3*d*, *A. D.* 1896.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased.
No. 585. October Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed, with costs.

Per MR. JUSTICE MORRIS.

November 3, 1896.

85 In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA
vs.
ELIZABETH L. W. BAILEY, Administratrix, etc., etc.
No. 585.

And now comes the appellant, The District of Columbia, and prays the court to grant a writ of error in the above cause to the Supreme Court of the United States.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for the Appellant.

Messrs. Worthington and Williamson.

GENTLEMEN: Please take notice that we shall call the above application to the attention of the court on Tuesday, May 25th, 1897, at the hour of 10 o'clock a. m., or as soon thereafter as counsel can be heard.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for Appellant.

Service of a copy of above application acknowledged this 15th day of May, 1897.

A. S. WORTHINGTON,
Attorney for Appellee.

Endorsed: Court of Appeals. No. 585. District of Columbia *vs.* Elizabeth L. W. Bailey, etc. Application for writ of error to Supreme Court U. S. Clerk please file. S. T. Thomas, A. B. Duvall, att'ys D. C. Court of Appeals, District of Columbia. Filed May 17, 1897. Robert Willett, clerk.

86 TUESDAY, *May 25th, A. D.* 1897.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased. } No. 585.

The petition for a writ of error to remove the above-entitled cause to the Supreme Court of the United States was submitted to the consideration of the court by Mr. M. N. Richardson, for the appellant.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased. } No. 585. April Term, 1897.

On consideration of the petition of the District of Columbia for a writ of error to remove this cause to the Supreme Court of the United States, it is now here ordered that the said writ of error be, and the same is hereby, allowed, and that a citation issue to the appellee herein.

R. H. ALVEY,
Ch. Justice.

May 25, 1897.

87 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The District of Columbia, appellant, and Elizabeth L. W. Bailey, administratrix of Davis W.

Bailey, deceased, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

88 UNITED STATES OF AMERICA, *ss:*

To Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The District of Columbia is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 25th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.

A. S. WORTHINGTON.

May 27, '97.

[Endorsed:] Court of Appeals, District of Columbia. Filed May 27, 1897. Robert Willett, clerk.

89 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 88, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The District of Columbia, appellant, *vs.* Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased, No. 585, October term, 1897, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 2d day of June, A. D. 1897.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

90 TUESDAY, *November 3d, A. D.* 1896.

ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased, Appellant,
vs.
THE DISTRICT OF COLUMBIA.
} No. 584. October Term, 1896.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

November 3, 1896.

91 In the Court of Appeals of the District of Columbia.

ELIZABETH L. W. BAILEY, Administratrix, Appellant,
vs.
THE DISTRICT OF COLUMBIA.
} No. 584.

The appellant, Elizabeth L. W. Bailey, administratrix, prays the court to grant her a writ of error in this case from the Supreme Court of the United States to review the final judgment of this court herein.

A. S. WORTHINGTON,
Attorney for Elizabeth L. W. Bailey, Administratrix.

Endorsed: No. 584. Eliz. L. W. Bailey, administratrix, appellant, *vs.* The District of Columbia, appellee. Petition of appellant for allowance of writ of error. Court of Appeals, District of Columbia. Filed Jun- 22, 1897. Robert Willett, clerk.

92 TUESDAY, *June 22d, A. D.* 1897.

ELIZABETH L. W. BAILEY, Administratrix of Davis W. Bailey, Deceased, Appellant,
vs.
THE DISTRICT OF COLUMBIA. } No. 584.

On consideration of the petition of Mr. A. S. Worthington, attorney for the appellant in this cause, for a writ of error to remove said cause to the Supreme Court of the United States, it is now here ordered that said writ be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

93 Know all men by these presents that we, Elizabeth L. W. Bailey, administratrix of the estate of Davis W. Bailey, deceased, as principal, and Arthur S. Browne, as surety, are held and firmly bound unto the District of Columbia in the full and just sum of three hundred dollars, to be paid to the said The District of Columbia, its certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Elizabeth L. W. Bailey, administratrix, as aforesaid, a judgment was rendered against the said Elizabeth L. W. Bailey, administratrix, as aforesaid, and the said Elizabeth L. W. Bailey, administratrix, as aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The District of Columbia, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Elizabeth L. W. Bailey, administratrix, as aforesaid, shall prosecute said writ of error to effect and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

ELIZABETH L. W. BAILEY, [SEAL.]
Administratrix of Estate of Davis W. Bailey, Deceased.
ARTHUR S. BROWNE. [SEAL.]

Sealed and delivered in the presence of—
E. B. MEEKINS,
As to Elizabeth L. W. Bailey.
CHARLES L. FRAILEY,
Witness as to Arthur Browne.

Approved by—
R. H. ALVEY,
Chief Justice Court of Appeals, D. C.

This bond is satisfactory.

S. T. THOMAS,
Attorney for the District of Columbia.

[Endorsed:] No. 584. Elizabeth L. W. Bailey, adm'x, &c., *vs.* The District of Columbia. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jul- 14, 1897. Robert Willett, clerk.

94 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 4, are true copies of the judgment, petition for writ of error, order allowing writ of error, and bond in the case of Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased, appellant, *vs.* The District of Columbia, No. 584, October term, 1896, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 17th day of July, A. D. 1897.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

95 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased, appellant, and The District of Columbia, appellee, a manifest error hath happened, to the great damage of said appellant, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

96 UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 14th day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted July 14, 1897.

S. T. THOMAS,
Attorney D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul-14, 1897. Robert Willett, clerk.

Endorsed on cover: Case No. 16,603. District of Columbia Court of Appeals. Term No., 390. The District of Columbia, plaintiff in error, *vs.* Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased. Filed June 5, 1897. Case No. 16,633. Term No., 420. Elizabeth L. W. Bailey, administratrix of Davis W. Bailey, deceased, plaintiff in error, *vs.* The District of Columbia. Filed July 21st, 1897.

FILED
JAN 7 1898
JAMES H. McKENNEY,
CLERK.

No. 1000.

THE DISTRICT OF COLUMBIA, Plaintiff in Error,

vs.

ELIZABETH L. W. BAILEY, Administratrix of DAVID W. BAILEY, Deceased.

No. 1001.

ELIZABETH L. W. BAILEY, Administratrix of DAVID W. BAILEY, Deceased, Plaintiff in Error,

vs.

THE DISTRICT OF COLUMBIA.

In Error to the Court of Appeals of the District of Columbia.

SIDNEY T. THOMAS,
ANDREW B. DUVALL,
For District of Columbia, Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 390.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

ELIZABETH L. W. BAILEY, ADMINISTRATRIX OF DAVIS W. BAILEY, DECEASED.

No. 420.

ELIZABETH L. W. BAILEY, ADMINISTRATRIX OF DAVIS W. BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

In Error to the Court of Appeals of the District of Columbia.

BRIEF FOR THE DISTRICT OF COLUMBIA.

This was an action brought in the supreme court of the District of Columbia to recover against the District the sum of $10,519.20, with interest thereon, from July 18, 1892, upon an alleged award of J. J. Johnson for that sum. The District of Columbia appeared by its attorney and pleaded:

1. That the plaintiff and the defendant did not argue

to submit the matters of difference between them to the award and arbitrament of said Johnson.

2. That the said Johnson did not make an award of and concerning said matters of difference.

3. That Davis W. Bailey, the plaintiff's intestate, on February 24, 1883, brought an action in the supreme court of the District of Columbia to recover $25,000 damages for an alleged breach of contract for resurfacing with asphaltum certain streets and avenues in the city of Washington in the year 1879. That the District of Columbia filed pleas to said action, and issue was joined thereon and the same was calendared for trial; that on the death of said Davis W. Bailey, in 1883, said action was revived in the name of his administratrix, the present plaintiff; that afterwards, on July 18, 1892, without an order of said court, as required by its forty-seventh common-law rule, the said Johnson assumed, without authority of law, to make and file in the cause a report, in which he found $10,519.20 against the District in favor of the plaintiff; that the defendant filed exceptions to the said report and the plaintiff moved for judgment thereon, which motion is still pending and undisposed of; that said cause is numbered 24,279 on the law side of said court and is made a part of this case by reference; that the alleged award by Johnson was not under seal and was never delivered to the defendant; and that the District never undertook and promised in manner and form as alleged; and that it was not indebted as alleged.

The merits of the case are briefly and concisely stated by Captain F. V. Greene, assistant to the Engineer Commissioner, in a report made thereon March 10, 1883, which it was agree should be received in evidence before Mr. Johnson, with the same effect as if

Captain Greene had appeared and testified to the facts therein stated.

Captain Greene was on duty as an assistant to the Engineer Commissioner at the time, and was familiar with all of the details of the work, the same having been done under his immediate supervision. He says: (Rec. 75.)

WASHINGTON, D. C., March 10, 1883.

Major G. J. Lydecker, Corps of Engineers, U. S. A.,
Engineer Commissioner, D. C.:

MAJOR: In the matter of the suit of D. W. Bailey for $20,000 damages for non-fulfillment of contract, I have the honor to make the following report as a basis of defense:

On the 30th of July, 1879, a contract was awarded to the *Bailey-French Paving Company*, per D. W. Bailey, agent, for resurfacing certain streets. Copy of contract herewith. The estimated amount of work was 45,537 square yards, on which the contract price varies, with different streets, from 83 cents to $1.05 per square yard, amounting to $40,950.86 in all. The conditions of the contract required the contractor to do any extra work that might become necessary in consequence of change of plans during the progress of the work. Such a change became necessary. It had been originally intended to stop the resurfacing within about two feet of the gutter, leaving a beveled edge; between this and the curb the old pavement was not to be touched. Where the old pavement showed a sufficient amount of curb to take the new pavement it was intended to lay the new pavement up to the curb. It was found in fact that in very few cases was there enough showing of curb to admit a new pavement, and that the proposed beveled edge would not be durable. Another plan was, therefore, adopted

and the contractor notified to execute it. He made no protest and did execute it. This plan was to cut out the old pavement for a sufficient width from the curb, excavate a certain amount of earth under it, so as to lower the grade, and then lay an entirely new pavement in the gutter. For this the contractor was paid at fair rates, much more remunerative in fact, than his rates for resurfacing.

The extra work on this contract and others for similar work, increased the cost of all the resurfacing done in that year. The appropriation being for a specific amount of money, the Commissioners had no discretion to go beyond that amount, and of course the amount of work had to be reduced. Mr. Bailey was therefore notified on February 12, 1880, that so much of his contract as applied to Mount Vernon square, from Seventh to Ninth streets west, and Pennsylvania avenue, from Sixth to Eighth streets east, was revoked, as the Commissioners would have no funds to pay for those streets. This is the entire history of the transaction. Owing to a necessary change of plans, a portion of the work had to be omitted for lack of funds to pay for it.

The item of $20,000 damages is simply preposterous. The whole amount of his contract was only a little more than $40,000, and he executed about three-fourths of it as originally designed, the amount revoked being only about $10,000; on this latter amount he was to make a profit of $20,000 if his statement of damages be correct. In fact, however, Mr. Bailey was paid $5,748.14 for his extra work, making the total amount received by him under his contract $35,953.18, against an estimated amount, when the contract was signed, of $40,950.86. The difference of about $5,000 is not unusual as between the estimated

and actual amount of work. Mr. Bailey was paid in full for all work done by him and at the rates named in the contract, which he voluntarily proposed and signed.

If this suit is pressed, attention should be drawn to the fact that Bailey did not execute his part of the contract. He contracted to finish all the work in 120 days from July 30, 1879. In fact, he did not complete so much as he was allowed to execute in less than 230 days from July 30, to wit, on or about February 20, 1880, and thereby subjected the District to great annoyance and positive loss in the employment of inspectors for a longer time than was absolutely necessary for the work.

Moreover, the work was in places badly done and was not kept in repair as agreed upon in the contract by said Bailey, so that the District was forced to make repairs at an expense of $1,012.30, for which I believe suit is now pending against said Bailey. The papers were sent to the attorney about a year ago.

Very respectfully,

F. V. GREENE,
Captain Engineers, U. S. A.

"It was agreed that this letter should be received in evidence, and have the same force and effect as if Captain Greene had testified to the facts therein under oath.

"J. J. JOHNSON,
"Referee."

The original action was to recover damages for breach of contract for resurfacing asphaltum pavements, the alleged breach consisting in the rescinding, by the Commissioners, of the plaintiff's contract and refusing to pay him the money the District

had agreed to pay him. Before the referee, Mr. Williamson, counsel for the plaintiff, in opening the case (Rec. 47), stated that the claim was for resurfacing certain streets and parts of streets with asphaltum under contract No. 222, between the *District of Columbia and the "Bailey-French Paving Company*, in 1879; that *Bailey* complied with all the requirements specified *in said contract* until he had completed something over one-half of the work, when the Commissioners sent him a letter, dated February 12, 1880, rescinding the unexecuted balance of the contract; that when the contract was rescinded the contractor was in a position to continue and complete the work; that he had on hand a large quantity of material and machinery, which was nearly a complete loss, and that in addition he claimed for *one-half inch extra surface*, and that the *entire claim* was for that one-half inch extra surface and on the unexecuted part of the contract."

The fact is, the so-called award of Mr. Johnson was based on a claim by *Davis W. Bailey*, individually, against the District for alleged breach of a contract between the District and the *"Bailey-French Paving Company,"* of which he was, as stated in the declaration, only the *agent*. The contract did not provide for *extra work*, but, on the contrary, stipulated that no claim for extra work should be made unless such work was first ordered by the Commissioners *in writing*. Extra work amounting to $5,748.14 was ordered and paid for, yet the referee allowed $6,079.05 for extra work, which could not have been recovered in any view of the case, for there was no pretense that there was any contract for extra work unless ordered by the Engineer Commissioner, and $4,440.15 for alleged profits on the unexecuted balance of the contract. In

other words, in a case in which it was manifest there could be no recovery because there were no contract relations between the parties, the referee found the District of Columbia indebted to a man who never claimed to be anything more than an *agent* of the contractor, in the sum of $10,519.20.

The original and sole counsel for the appellee before the referee was Mr. W. Preston Williamson, who represented her down to and including the time of filing a motion for judgment on said report, pursuing the well-understood agreement of parties that Mr. Johnson was only to make a *report*, which was to be *advisory to the court*, and simply a step in the cause.

Thereupon additional counsel was procured and an action brought on said report on the theory that it was a common law award and operated to discontinue the original case in which it had been filed, and this in defiance of the fact that the first case down to the time of trial of the case was pending on the appellant's motion for judgment on said report.

The present counsel for the District took no part in the proceedings before Mr. Johnson, referee, and knew nothing of them until after he had filed his report.

ASSIGNMENT OF ERRORS.

The court below erred—

1. In sustaining the consolidation of the two causes.

2. In holding that oral testimony was admissible to show that the intention of the Commissioners of the District of Columbia, and the defendant in error, was to submit the case to arbitration, the alleged agreement of the parties to refer the cause being in writing.

3. In holding that the report of the referee was properly read in evidence, without including the papers and evidence attached thereto, and filed therewith, by the referee as part of his report.

4. In holding that the evidence attached to and forming part of the report of Mr. Johnson, referee, was properly excluded from the consideration of the jury.

5. In holding that the report of the referee was admissible in evidence as an award.

6. In granting the plaintiff's first prayer. (Rec. 40.)

7. In refusing to direct a verdict for the defendant. (Rec. 41.)

8. In refusing to grant the defendant's third prayer, that the Commissioners were without authority to agree to submit the matters in controversy to the final award of an arbitrator. (Rec. 41.)

9. In refusing to grant the defendant's fifth prayer, (Rec. 42), that the plaintiff, as administratrix of her deceased husband, had no authority to agree to submit the claim to arbitration.

POINTS AND AUTHORITIES.

I.

It was error to consolidate the two causes; they were not of a like nature, nor did they relate to the same question; one was to recover *damages* for an alleged breach of contract, while the other was *debt* upon an alleged award. If the report of Mr. Johnson

was an award, then it operated to discontinue the original action, and for that reason it was improper to consolidate the causes, there being nothing in dispute to try in the original cause. There were *not* two causes of action pending. Either the first cause was discontinued by operation of law or it was pending with the report of the referee in it to be disposed of. If it was discontinued it was dead, and it was plainly error to consolidate it with a new cause. If it was pending it was likewise error, since in that event the second cause was non-existent, because no cause of action existed. The manifest effect of consolidating the two causes, if they were not of a nature to be consolidated, was to confuse the jury by a multiplication of dissimilar issues. In one case the issue was breach of contract or no, while in the other it was award or no. It is immaterial that the judge in his general charge to the jury undertook to relieve the case of this embarrassment by directing a verdict for the defendant in the original case.

Under the proceedings resorted to in this litigation the defense of a "former suit pending" is of no avail whatever, for by the order consolidating the two cases that defense was effectually obliterated.

II.

The agreement of the parties to refer the cause to Mr. Johnson as referee being in writing, if Mr. Williamson's letter (Rec. 18), and the Commissioners' order (Rec. 20), constituted such agreement, oral evidence was inadmissible to show the intention of the parties; that must be gathered from the writings themselves. It is manifest that the purpose of introducing oral evidence on the subject was to supplement the writing and supply a deficiency which the appellee deemed

necessary in order to show an intention to submit to arbitration.

A written submission cannot be varied by parol evidence. Neither is it competent to show by parol evidence what the written submission in fact was.

Efner *vs.* Shaw, 2 Wend., 567.
MeNear *vs.* Bailey, 18 Maine, 251.
DeLong *vs.* Stanton, 9 Johns, 28.

In this respect the general law concerning contracts applies without modification.

Morse on Arbitration and Award, 63.

A memorandum of an agreement to refer is wholly superseded by a subsequent complete reference of submission. And the verbal agreement made prior to, or contemporaneously with, a written submission is merged in the latter.

Morse on Arbitration and Award, 63.
Billington *vs.* Sprague, 22 Me., 34.
Loring *vs.* Alden, 3 Metc. (Mass.), 576.
Symonds *vs.* Mayo, 10 Cush., 39.
Palmer *vs.* Greene, 6 Conn., 14.

A case submitted to arbitration *pendente lite* will in no case be considered discontinued where the terms of the submission show the intention of the parties not to discontinue.

Jacoby *vs.* Johnson, 1 Hun., 242.
Hearne *vs.* Brown, 67 Me., 156.
Ensign *vs.* St. Louis, etc., R. Co., 62 How. Pr. (N. Y.), 123.

The object of a reference in this case was to terminate the litigation in the original cause, not to begin new litigation. This is shown by the order of the Commissioners appointing Mr. Johnson referee (Rec. 20) and the subsequent proceedings in the original cause. The referee made his report and filed it in the original cause, together with the testimony on which he based it; the defendant filed exceptions to that report (Rec. 34), and the appellee (Rec. 34) moved for judgment in the original cause, and subsequently (Rec. 35) moved the court to confirm the award of the arbitrator, J. J. Johnson, and enter judgment thereon. All this was consistent with the order of the Commissioners appointing Mr. Johnson referee. There was no intention to discontinue the cause and submit the matters of difference between the parties to arbitration. The matter was depending in court, and both parties took action in regular course therein, such action being a matter of record, and we submit that it is incompetent, by oral testimony, to nullify the acts of record of the parties in a pending cause.

As was said by the court below in its opinion disposing of this case on the first appeal (4 App. D. C., 368), "To discontinue the pending case, leaving the successful party to his action on the award, is simply to make the award the beginning of a new litigation instead of terminating the old. Both reason and policy would seem to oppose such practice."

The practical interpretation put upon the agreement by the parties was that the referee was to make a report only. This controls.

Chicago *vs.* Sheldon, 9 Wall., 54.

III. AND IV.

It was error to admit a part only of Mr. Johnson's report. The documents and evidence attached to that report were necessarily a part of it. He returned the testimony with his findings, under one and the same cover, marked by him "Report of referee." (Rec. 77). The report and the testimony annexed to and forming part of it was offered in evidence by counsel for the defendant (Rec. 32). It is manifest that such was the extent of the offer. Counsel for the plaintiff had already offered in evidence the findings of Mr. Johnson (Rec. 26), and objection was made (Rec. 30) to such offer on the ground that the whole report, and such papers and evidence as appeared attached thereto, should be offered with it, if offered at all. The findings of the referee being already in evidence at the instance of the plaintiff, it was not the intention of the defendant to again introduce those findings without also introducing the papers annexed to them and under the same cover. No reasonable purpose can be assigned for the defendant to again offer the findings of the referee in evidence unless it was to get in the accompanying papers, which had not been offered by the other side. The statement by the trial justice (Rec. 77) that the evidence so called (meaning the evidence annexed to Mr. Johnson's report) is not part of the report, and was not included in the offer, is incorrect as matter of law and is not justified by the record.

V.

It was error to admit in evidence the report of Mr. Johnson as an award. Even if his report could be

considered as an award, it lacks the element of mutuality; the plaintiff sues as an administratrix; as such, she was without power to submit alleged differences to arbitration. An administrator has no such authority. By statute his powers as to the collection or payment of claims are restricted.

Clark *vs.* Hogle, 52 Ill., 427.

It may be claimed that such authority exists under the Maryland statute, because the statute only provides the method of proceeding in regard to claims against the estate of a deceased; but the reason assigned for the refusal of the power to an administrator in Maryland to submit a claim against the estate to arbitration without the previous authority of the court, and without the formalities of the statute, is equally potent in the case of a claim in favor of the estate, the reason being that by such submission the assets might be reduced by the payment of costs and expenses to the prejudice of creditors and distributees.

Nor had the Commissioners of the District of Columbia the right or authority to submit said matters of difference to arbitration. While it may be conceded that a municipal corporation, with power to contract, with liability upon the contract, may generally have power to submit to arbitration, yet this defendant cannot, because of the limitations imposed upon it by the act of Congress of June 11, 1878, establishing the present form of government. It might consent in a pending cause to refer the question in dispute to arbitration, because being a party to an action in court, with power to sue and be sued, it might lawfully take any step that an individual might, under like circumstances, to bring the cause to final judgment.

Alexandria Canal Co. *vs.* Swan, 5 How., 83.

The presumption is that the Commissioners did what they might lawfully do. That is, in a pending suit, agreed to refer it to Johnson for his *report* to enlighten the court with reference to its conclusion and to speed the disposition of the controversy. There is no presumption that the Commissioners undertook to do an unlawful thing, OMNIA RITE ACTA PRAESUMUNTUR. No such authority was reposed in the Governor or Board of Public Works, to whose authority they succeeded. The act of 1878, establishing a permanent form of government for the District of Columbia (Rich. Supp. Rev. Stat. U. S., 145), section 3 declares: "But said Commissioners * * * shall make no contract nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress." And by section 13 it is declared to be a high misdemeanor for any officer to knowingly increase the indebtedness of the District of Columbia except as authorized by that act.

The report or so-called award is *uncertain*. "I do therefore find (says the referee) that there is due to the plaintiff from the defendant the sum of $10,519.20, besides costs, $550. "Besides costs!" What costs? Again the referee reported in favor of the "Plaintiff." Nowhere in his report does the referee mention who the plaintiff is or who the defendant is. The caption of the report, being the title of the cause in which he filed the same, is *Davis W. Bailey vs. The District of Columbia.* The plaintiff in her present case, in her declaration (Rec. 1), avers that she, as *administratrix of Davis W. Bailey*, had brought a suit at law in the supreme court of the District of Columbia against the defendant, "for money due and owing to her for work done and materials furnished to the defendant

by Davis W. Bailey during his lifetime, and to put an end to the differences the parties submitted to the arbitration and award of J. J. Johnson, Esq., who made an award in writing between the plaintiff, administratrix of the estate of Davis W. Bailey, deceased, and the defendant." It is manifest that Johnson's report or award was not in any matter in which *she*, as *administratrix*, was concerned. If, to render his finding intelligible, resort can be had to the caption of the paper to determine and ascertain who is "the plaintiff" to whom he finds and reports there is due "The sum of $10,519.20, besides costs" (Rec. 30), we find it is not the present plaintiff.

IT APPEARS ON THE FACE OF MR. JOHNSON'S REPORT THAT HE ALLOWED THE VERY LARGE SUM OF $6,079.05 FOR EXTRA WORK, WITHOUT BEING ABLE TO JUSTIFY SUCH FINDING BY THE WRITTEN AUTHORITY OF THE COMMISSIONERS.

Assuming, for the sake of argument, that the report of Mr. Johnson may be considered as an award, having disclosed the ground of his findings the court has authority to inquire into the correctness of those findings.

1 A. & E. Ency. 675, and cases.

In the State of Maryland, and under the act of 1778, ch. 21, par. 17, it has been decided over and over again that upon the general principles of arbitration and award if an arbitrator discloses in his award the ground of his decision the same is reviewable, and, if contrary to law, may be set aside.

State *vs.* Williams, 9 Gill., 172.
Oliver *vs.* Heep, 2 H. & M., 479.
Hewitt *vs.* The State, 6 H. & J., 97.
Goodsmith *vs.* Daly, 1 Id., 361.

Tillard's Lessee *vs.* Fischer, 3 H. & M., 118.
Woods *vs.* Matchett, 47 Md., 390.

And this is the settled doctrine in other jurisdictions.

Morse on Arbitration and Award, 326.

So it seems it would be for such reasons reported in any other authentic manner to the court.

Kent *vs.* Elstof, 3 East, 18.
Knox *vs.* Walton, 2 Wash., 507.
Kelly *vs.* Johnson, 3 Id., 47.

Or, where accompanying an award is a paper which discloses the grounds taken by the arbitrator in forming his opinion of the subject, wherein he committed a mistake in point of law between the parties.

Hewitt *vs.* The State, 6 H. & J., p. 97.

"If herein the arbitrators mistook the law, and because of that mistake have given an award in favor of the defendants, and this be shown by the award, the court has the power and was bound to set aside the award."

Stobe *vs.* Calvert, 9 Gill., 175.

"Where it clearly appears upon the face of an award, or by the evidence of the arbitrators, that in making the award there was a mistake in a matter of fact, it is a valid objection to the award."

Conger *vs.* James, 32 Tenn., 215.
Billings on Awards, p. 61.

In order to effectuate the intention of the parties in the matter of arbitration, Rule 72 of the court below

provides as follows: "Wherever an award has been returned by the arbitrator and approved by the court in the manner directed (by Rule 51), judgment shall be entered thereon."

The court cannot be said to approve of an award unless it is placed in a position to know that the award ought to be approved. A submission under a statute which requires the court to "approve" the award gives the court power to inquire into the decision of the arbitrators as regards matters of law.

Allen *vs.* Miles, 4th Harr. (Del.), 234.

If a statute or rule under which a submission is entered into requires the court "to approve," it is essential that the award shall be good in point of law.

Morse on Arbitration and Award, p. 303.

In the absence of statute, under the reference in this case, the rule laid down by Field, J., in Lumber Co. *vs.* Buchtel (101 U. S. 637), should be applied, "The *finding should have the precision of a special verdict, and specify with distinctness the facts found and not leave them to be inferred.*"

See also the case of Belmont *vs.* Railroad Company (3 Mackey, 357), wherein it was held that an agreement of parties by their attorneys to refer a pending case to a special referee "whose award, when approved by the court, is to be its judgment, was not within the Maryland act." In that case, as in this, the referee "took testimony and made an award in which the facts established by the testimony are stated at large with his conclusions of law." Exceptions were filed to this award and a motion made to enter judgment thereon. The judge holding the circuit court denied the motion to

enter judgment and sustained the exceptions to the award and set it aside, and from that order an appeal was taken. In sustaining a motion to dismiss, the court used this language: "If it had been a reference to arbitration under the rules of the court, or under the Maryland act, which authorized reference to arbitration, the effect of the award would have been entirely different from the one contemplated by this order. We can only consider this order as authorizing the referee to report the case to the court for its judgment and as in the nature of a special verdict or an agreed statement of facts. This appears also to have been the construction put upon it by the referee himself, for he reports at large and in great minuteness the facts established by the testimony and the conclusions of law which he thinks ought to be applied to them, so that the court might see the whole case and approve or disapprove of his award. The court exercised that discretion and held that it must be set aside.

"Now, it may be that the attorneys intended to make a reference to arbitration. We know very well what the effect of an award of arbitrators is; that it is final and conclusive on all the facts in the case, and the controversy cannot be inquired into either by the parties or by the court. The duty of the court is a merely formal act then, or nearly so, to enter judgment upon the award. And that makes an award of an arbitrator a practical determination of a controversy."

If the arbitrator professes to decide upon the law and he mistakes it, the court will set aside the award; also where the arbitrator's reasons did not appear upon the face of the award, but only upon another paper delivered therewith.

The act declares "that the award or report of the referee made according to the reference and approved

by the court shall be deemed and taken as available in law as the verdict of a jury. Upon exceptions taken to the award the court cannot approve it, and thus give it the effect of a verdict without information of the matters which came under the cognizance of the arbitrators * * *. where it manifestly appears that arbitrators have clearly mistaken the law, or that they knew what the law was and purposely disregarded it, or that they have made an evident mistake in matters of fact, the court is bound to set aside an award, as they are to set aside a verdict which is manifestly against the law and facts."

Allen *vs.* Smith, 4 Harr. (Del.), p. 236.

"If every door is to be closed against the courts arriving at the knowledge of the facts upon which the referee decided, I should strongly incline to doubt whether this mode of trial would deserve one-half the encomiums passed upon it. It would be to say that whatever may be the degree of injustice committed by the mistakes of arbitrators, yet the court must approve and give validity to those mistakes if the referees have been cautious enough not to spread them upon the face of the award."

Hurst *vs.* Hurst, 1 Wash. C. Ct., 60.

The court in the last cited case must have cast its prophetic eye to this jurisdiction and have seen the case at bar.

"The sacredness of awards ought not to be extended beyond that of verdicts; it must justify the court in putting them upon the same footing when errors are suggested in clear points of law or facts."

Williams *vs.* Craig, 1 Dall., 315.

"The principles on which a court proceeds with regard to exceptions to awards are well established. They will set aside an award for error in law or manifest error of fact."

Tilghman, C. J., in Gove *vs.* Reed, 4 Yeates, 461.

"But," said that learned judge (Large *vs.* Passemore, 5 S. & R., 52), "where the point turns on the construction of the writing the court considers the writing and corrects the error, if it appears that the referee has been mistaken.

"So also the error is to be corrected if the principles on which the award is founded are contrary to law."

The law was also applied by the general term of the supreme court of the District of Columbia in the case of Strong *vs.* Clarke, Exr., at law, No. 16,232 (not reported), where the order of reference was:

"It is this 18th day of December, 1877, ordered, that the above exhibited cause be, and the same hereby is, submitted and referred to the arbitration and award of James G. Payne, saving all rights that now exist." With the award in this case there was submitted a stenographer's report of all that took place before the referee and his rulings thereon—the same course that was pursued in the present case, and the court reviewed the award in that case.

So in the United States *vs.* Farragutt (22 Wall., 420), where a report or an award was made in the cause and it was held that it would be construed by the same general principles which would govern it in a court of common law or equity. "Nor do we conceive," says Mr. Justice Miller, delivering the opinion of this court, "notwithstanding the expression in the agreement of submission that all questions of law in the case are

concluded by the award. * * * The award was also liable, like any other award, to be set aside in the court below for such reasons as are sufficient in other courts, for exceeding the power conferred by the submission for manifest mistakes of law." As was said by the court in Buckingham *vs.* Payne (36 Barb., 81), "the facts found by the referee must sustain his finding upon the law, and the law of the case must be predicated upon such finding of facts." Tested by this standard, the report of Mr. Johnson is absolutely unfounded in law or in fact, and instead of finding for the plaintiff he should have found for the defendant.

VII.

THE LEGAL EFFECT OF THE ACTS OF THE RESPECTIVE PARTIES REGARDING THE CONDUCT AND DISPOSITION OF THE CASE WAS A MATTERF OR DETERMINATION BY THE COURT, AND NOT BY THE JURY.

The court manifestly erred in granting the plaintiff's prayer (Rec. 40-41), which was based on oral testimony as to the intention of the parties and was supplementary to their alleged written agreement, and left to the jury the question whether Mr. Johnson "intended to make a final finding in the case in pursuance of said agreement between the parties," and the further question whether the parties intended to submit to arbitration.

If the report had been improperly filed in the case leave should have been prayed to take it off the files.

VIII.

The trial court should have directed a verdict for the defendant as prayed (Rec. 41). The order of the Com-

missioners appointing Mr. Johnson referee, and the conduct of the parties subsequent thereto, and the record in the original cause showed conclusively that it was not the intention that Mr. Johnson should make an award, but only a report which should be *advisory* to the court and the basis of its judgment in the original cause.

It is manifest that no judgment against the District could have been properly entered in the original cause, on Mr. Johnson's report, and the evidence returned with it, which consisted of the report of *Lieut. Greene* for the defendant (Rec. 75), and the disposition of *Francis D. Bailey* (Rec. 48 to 75), for the plaintiff. From Lieut. Greene's report it appears that the amount of paving awarded to the *Bailey-French Paving Company* for resurfacing certain streets was 45,537 square yards, on which the contract price varied from 82 cents to $1.05 per square yard, amounting in all to $40,950.86; the contractor was to do all extra work that might become necessary in consequence of a change of plans during the progress of the work. Such change became necessary, and the contractor was notified to execute the work according to the changed plans, and did so without protest, and was paid for the extra work at fair rates, "much more remunerative in fact (says Lieut. Greene) than his rates for resurfacing." In consequence of a failure to get the necessary appropriation from Congress the contractor was notified, February 12, 1880, that so much of the contract as applied to Mount Vernon square, from Seventh to Ninth streets west, and Pennsylvania avenue, from Sixth to Eighth streets east, was revoked, the Commissioners having no funds to pay for the same. Up to this time the contractor had been paid $5,748.14 for extra work, making the total amount received under the contract $35,-

963.18, as against $40,950.86, the estimated cost of the entire work. The difference (says Lieut. Greene) of about $5,000 is not unusual as between the estimated and actual amount of work. "Mr. Bailey was paid in full for all work done by him at the rates named by him in the contract, which he voluntarily proposed and signed." As against the statement of Lieut. Greene, we have the testimony of *Francis D. Bailey*, the plaintiff's son, who says he was the foreman at the factory of the contractor, that is to say, the place where the material for the pavement was prepared, and that his business frequently called him upon the street. He thought the contractor would have made about $5,000 on the part of the contract which was not executed. He based this estimate on figures he had made in other cases. This witness had forgotten the streets to be improved under the contract, and refreshed his memory from memoranda which he said he had made from the contract some days before he gave his testimony.

It would be absurd to contend that the testimony returned by Mr. Johnson with his report furnishes any basis for his findings. It is not surprising, then, that additional counsel for the plaintiff, after filing a motion to confirm the report of Mr. Johnson, should, on reflection, change his mind and bring a new suit. He knew perfectly well there could be no recovery against the District in the original cause if the report of Mr. Johnson was to be the basis of that recovery. It was a very shrewd move to undertake to extricate the plaintiff from the predicament the case had gotten into, to treat Mr. Johnson's report as an award, and bring a new suit to recover the amount of his findings. By this means the plaintiff might recover, a thing she could not do in the original cause, if it was to be de-

cided on the basis of Mr. Johnson's report and the evidence returned with it.

Now, the question is, can the District be mulcted in a judgment for $10,519.20 with interest from the 18th day of July, 1892, by this jugglery with judicial proceedings? We do not believe that courts of justice were instituted for any such purpose.

The judgment of the court below should be reversed with directions to enter judgment for the defendant in this case.

SIDNEY T. THOMAS,
ANDREW B. DUVALL,
For District of Columbia, Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1897.

THE DISTRICT OF COLUMBIA, *Plaintiff in Error*,
vs.
ELIZABETH L. W. BAILEY, *Administratrix of Davis W. Bailey, Deceased.* } No. 390.

ELIZABETH L. W. BAILEY, *Administratrix of Davis W. Bailey, Deceased, Plaintiff in Error*,
vs.
THE DISTRICT OF COLUMBIA. } No. 420.

Brief for Elizabeth L. W. Bailey, Administratrix, Defendant in Error in Case No. 390 and Plaintiff in Error in Case No. 420.

STATEMENT OF THE CASE.

In 1883 Davis W. Bailey began an action at law against the District of Columbia (No. 24279), in the supreme court of the District, for $25,000 damages, for alleged breach of a contract for laying asphalt pavements in Washington (Record, 1). [All the references in this brief to the printed record relate to the folios or side paging.] This declaration, by consent of counsel for the District, was subsequently amended so as to include a claim for extra work done under the contract

(23, 26, 28). This amended declaration and the defendant's pleas were missing at the time of the trial below, but no objection was made on either side to the parol proof of their contents, and a replication to the pleas was filed, which of itself sufficiently indicates the substance of the defense (2, 3). However, what the pleas were became immaterial, as will be seen further on.

In 1885 the death of the plaintiff was suggested, and his widow, Elizabeth L. W. Bailey, as his administratrix, was made plaintiff in his place (3). On the 16th of September, 1891, the action being then still pending, the plaintiff's attorney, Mr. Williamson, wrote a letter to the Commissioners of the District of Columbia, in which he asked them to "appoint some good man as referee or arbitrator, to whom this case may be referred, with power to hear the evidence and make an award which shall be accepted, whether for or against us, as a final settlement of this long and much-litigated case" (20). On the 11th of January, 1892, the Commissioners appointed J. J. Johnson (a member of the bar of the supreme court of the District) "referee in the matter of the suit of Bailey, administratrix of Bailey, deceased, *versus* District of Columbia" (21). The parties, by their counsel and with their witnesses, appeared before the referee thus appointed, and, after hearing all the evidence submitted by either side and listening to the arguments of the respective counsel, Mr. Johnson made a written award, by which he found that there was due to the plaintiff $10,519.20, besides costs (30, 31). He prefaced his award with a report of the case, which report was entitled "In the supreme court of the District of Columbia. Davis W. Bailey *vs.* The District of Columbia" (27). He filed the report in court in that case July 18, 1892 (27). The award stated separately the amounts found due under the original declaration and under the claim for extra work in the amended declaration (30, 31). All the objections to the award made at the trial went to the award as a whole.

The plaintiff's counsel on the 12th of September, 1892, and again on March 10, 1893, moved the court to enter judgment on the award (35, 36). On the 23d of September, 1892, the attorney for the District filed exceptions to the award on the ground that it was "contrary to the evidence" and "excessive," because "the evidence was insufficient to support the award," and because "of plain and palpable errors apparent on the face of the award" (35). These exceptions, by consent of the plaintiff's attorney, were filed after the time allowed by the rules of court (35).

At this point in the case it was found that the parties differed as to what the agreement between them was in reference to the effect to be given to Mr. Johnson's award. The plaintiff's counsel insisted that the award was to be final. The attorney for the District (Mr. Thomas), who, after the award was filed, had succeeded Mr. Hazelton, who, as such attorney, had agreed to the submission, contended that the real understanding had been that Mr. Johnson was to make a report, which should be submitted to the court for review. As no order of court had been made referring the case to Mr. Johnson, and as an order could not be entered *nunc pro tunc* on account of this difference between the parties as to its terms, the plaintiff proceeded to bring a new action upon the award against the District. In her declaration in the second suit, which was filed August 8, 1893, she set up the pendency of the original action, the agreement to refer to arbitration, the award in her favor, notice to the District, and failure of the District to pay (8). This second action was numbered 34564. To the second declaration the defendant filed a number of pleas, the substance of which was that there had been no agreement to arbitrate (13, 14). To these pleas a general replication was filed (15).

Upon motion of plaintiff's counsel, the two actions were then consolidated (16). They were tried before Mr. Justice McComas and a jury. The court, when the evidence was concluded, directed the jury to find a verdict for the defend-

ant in the original action (42) and submitted the second case to the jury, leaving it to determine, upon the evidence, whether or not the agreement under which the case was submitted to Mr. Johnson was an agreement to arbitrate or a qualified submission, as was contended by the attorneys for the District (41–48). The jury found a verdict for the plaintiff for the amount claimed, with interest from the date of the filing of the award (16). A judgment having been entered in each case in pursuance of the respective verdicts, each of the parties appealed to the Court of Appeals of the District of Columbia. That Court affirmed both the judgments (80–84. See 9 Ap. Cas. D. C., 360). Each of the parties thereupon brought the case to this Court by writ of error.

During the trial the defendant's counsel took a number of exceptions to the rulings of the court, which were embodied in seven separate bills of exceptions (22, 23, 25, 26, 31, 43, 48). One of these bills, the sixth, by inadvertence was not signed by the presiding justice (43). In it are contained all the exceptions which were taken to the instructions to the jury given or refused by the court at the trial. The seventh bill of exceptions (47, 48) refers to the exceptions "to such parts of said charge as are contained within brackets." No parts of the charge are included in brackets.

The plaintiff duly excepted to the instruction given by the court to the jury in the first case, to render a verdict in that case for the defendant, and her exception was incorporated in the seventh bill of exceptions, which was duly signed (42, 48).

In this Court, as in the Court of Appeals, the administratrix is satisfied to have both the judgments below affirmed, and asks that this be done without costs as against her. She appealed to the Court of Appeals, and now brings the case here on writ of error, solely in order that if the judgment in her favor in the second suit should be set aside, the court below may be directed to enter judgment in her favor

in the first action, or to take such other steps therein as justice may require. She is forced, for her own protection, to a cross-appeal in a case in which she has no complaint to make of the action of the courts below.

ASSIGNMENTS OF ERROR IN CASE NO. 420.

The court below erred:

1. In affirming the judgment of the trial court in the original action No. 24279 in the supreme court of the District of Columbia.

2. In not holding that the trial court erred in instructing the jury in said case No. 24279 to find a verdict for the defendant.

3. In not remanding that case to the court below with instructions to set aside the judgment in favor of the defendant and to enter a judgment in favor of the plaintiff in the sum of $10,519.20, with interest from July 18, 1892, and costs.

ARGUMENT.

I.

There was no error in consolidating the two cases.

It is perfectly apparent that this was the only way in which justice could be done to both parties in the cases. The order was one which was within the discretion of the trial court. The unreasonableness of this objection on the part of the District is well stated by Mr. Justice Morris in delivering the opinion of the Court of Appeals (82).

II.

As to the admission of oral testimony to show the agreement between the parties.

It seems to be the contention of the counsel for the District that the written order of the Commissioners appointing Mr. Johnson referee (21) was in response to Mr. Williamson's letter of September 16, 1891 (19), and that these two writings constitute a complete contract between the parties. To this contention we reply:

1. That if this be true, no harm was done to the appellant by the admission of the oral evidence, because the proposition made in the letter was that the Commissioners should "appoint some good man as a referee or arbitrator to whom this case may be referred, with power to hear the evidence and make an award *which shall be accepted, whether for or against us, as a final settlement of this long and much-litigated case*" (20). The only question of fact seriously controverted at the trial was whether the parties referred the

case to Johnson as an arbitrator, whose decision was to be final, or as a referee, whose finding was to be reviewed by the court.

2. The order appointing Mr. Johnson referee is not addressed to Mrs. Bailey or her attorney. It does not refer to Mr. Williamson's letter. Without oral testimony to connect it with the letter, no connection is shown between them. The order is dated nearly four months after the letter was written. Both sides conceded that between the two dates they were engaged in a verbal negotiation as to a submission. Clearly, therefore, it is a case in which a part only of the contract was in writing. That being so, of course the whole matter was open to oral evidence to show what was the real agreement between the parties. (See Hays *vs.* Hays, 23 Wend., 263.)

III.

It was not error to allow the appellee to offer in evidence the award upon which she sued without compelling her to offer in evidence at the same time the papers appended to the award purporting to contain the testimony of Francis D. Bailey on behalf of the plaintiff in the action, and a copy of a letter of Francis V. Greene dated March 10, 1883, put in evidence before Mr. Johnson on behalf of the District.

1. These papers are not referred to in the report, or made part thereof in any way. This alone is fatal to the objection.

2. Before the award was offered in evidence, it had been shown by Mr. Johnson's uncontradicted testimony that these papers were not filed as a part of the report because all the testimony was not there; that the papers from the office of

the District Commissioners which had been before him were not filed in court, but were returned to the office of the Commissioners; that the report was of only a part of the testimony; and that the testimony was not read over to the witnesses, but was simply taken for his guidance (27).

3. It was not competent to submit to the jury the evidence upon which the award was made. It was left to the jury to say whether the parties did agree to accept Mr. Johnson's award as final, and that inquiry is closed by the verdict. The evidence cannot be looked at to see whether the arbitrator properly decided questions of fact. It must be presumed that there was evidence to sustain the award. On this point it is unnecessary to look further than the case in this Court cited in the brief for the appellant—U. S. *vs.* Farragut, 22 Wall., 415, 416, 422, 424.

IV.

As to the alleged exclusion of the "evidence" attached to the award.

1. What has been said above meets this assignment of error. The evidence, so called, was no part of the report, and if it had been, neither the court nor the jury could inquire into it to see whether the arbitrator had made a mistake.

2. But these papers were not excluded. They were not offered in evidence at all (33). It will be seen that no objection was made by Mrs. Bailey's counsel when the counsel for the District in case 34564 offered in evidence "the record and proceedings" in case 24279. Nor did the court in any way interfere. It is not pretended that the counsel for the District made any attempt to acquaint either the court or the jury with the contents of the papers in ques-

tion. What really happened was, that when the counsel came to prepare their bill of exceptions, a question arose as to whether, as a matter of fact, their offer of the report included these papers. The judge who presided at the trial and heard and saw what took place held that they had not been offered in evidence; and in his certificate which accompanies the bill of exceptions, but which is not a part of it, he states—what the bill of exceptions itself shows—that these papers were not read to the jury. They were, therefore, not offered in evidence, and there was no exclusion of them, and this assignment fails on that account.

3. If the bill of exceptions omitted anything that the counsel for the District conceived themselves entitled to have inserted in it, their remedy, upon the refusal of the court below to comply with their demand, was by *mandamus*. The novel course actually pursued—obtaining from the presiding justice a certificate explaining why he excluded the papers in question from the bill of exceptions—cannot avail them here.

4. And even if the so-called evidence was a part of the award, and was contained in the bill of exceptions as such, it would amount to nothing, even on the theory of appellant's counsel that it was for the court to review any supposed errors of law committed by the referee which are apparent on the face of the award. Counsel for the District have carefully refrained in their brief from pointing out any such supposed apparent error of law. The award of Mr. Johnson will be read in vain—either in connection with the supposed evidence or without it—in the search for errors of law, obvious or otherwise.

5. And of what avail is it to look at a part of the evidence to find out whether the arbitrator made a mistake, either of law or of fact? All presumptions are in favor of the award.

The arbitrator testifies, and nobody disputes, that only a part of the evidence was filed with the report. The very contract out of which the claim arose is missing from the so-called evidence. How could the trial court determine that the arbitrator had made a mistake without knowing what were the terms of the contract under consideration?

V.

There was no error in admitting the report or award of Mr. Johnson in evidence.

On examination of the Record (31) it will be seen that when the award was offered in evidence by plaintiff's counsel the objection that was made to its introduction was based upon two grounds and no other—first, that the so-called evidence should have been offered with the award, and, second, that "said referee was without authority to make an award."

The first objection has been already considered. The second was bad because it was too general. The fifth assignment of error—the only one relating to this exception—is itself too general to be valid.

In the brief the particular objections to the authority of the arbitrator are for the first time set forth. They are not such objections as can fairly be considered within the scope either of the objection made to the admission of the award in evidence (31) or of any of the assignments of error. They are:

(*a.*) The award lacks the element of mutuality.

(*b.*) The plaintiff, as administratrix, had no authority to submit the claim to arbitration.

(*c.*) The Commissioners had no authority to submit the controversy to arbitration.

The objection of want of mutuality seems to be based entirely upon the other two propositions.

An administrator has power to submit a claim, and especially one that is already in litigation, to arbitration.

3 Williams on Executors, bottom page 1801, note *i*.
2 Woerner's Am. Law of Administration, sec. 327.
Lyle *vs.* Rogers, 5 Wheaton, 406.
Morse on Arbitration and Award, 19, and cases cited.

The Illinois case upon which counsel rely is based wholly upon an Illinois statute.

The Commissioners of the District are also authorized to submit to arbitration a claim against the municipality which they represent, especially when an action is pending to enforce the claim.

1 Dillon, Mun. Corp., sec. 478 (and see cases cited in the opinion of the Court of Appeals, 82).

As to the hypercritical objection about the award being in favor of the "plaintiff," the Court will remember that this suit was originally brought by Davis W. Bailey in his lifetime; that Mrs. Bailey, as administratrix of her husband, was duly made party in his stead after his death (3); that in Mr. Williamson's letter to the Commissioners offering to arbitrate the case he refers to it as "the case of Davis W. Bailey *vs.* District of Columbia, No. 24279, at law" (19); and that in the order of the Commissioners appointing Mr. Johnson referee, the case is described as "in the matter of Bailey, administratrix of Davis W. Bailey, deceased, *versus* The District of Columbia" (21).

Under this head counsel for the District next proceed to contend that even if the report be considered as an award, Mr. Johnson "having disclosed the grounds of his findings, the court has authority to inquire into the correctness of those findings."

If this proposition be good law, as stated, it would be

worth while to inquire what an arbitration is good for in any instance.

The counsel proceed to cite cases at some length in support of their contention. It will be found upon examination of these authorities that they do not go to the length claimed, and that almost without exception they are cases in which there had been a reference by order of court. It will be noted that in this case it is established by the verdict of the jury that this was an arbitration, and that the parties did not intend when they entered into their agreement that the court should have authority to review the findings of the arbitrator. This distinction turns against the District every authority of any consequence upon which its counsel rely. Thus in Belmont *vs.* W. & G. R. Co., 3 Mackey, 357, the court, after resting its decision upon the fact that the parties had expressly agreed that the award should be subject to the approval of the court, says:

"We can only consider this order as authorizing the referee to report the case to the court for its judgment and as in the nature of a special verdict or an agreed statement of facts. * * *

"Now it may be that the attorneys intended to make a reference to arbitration. We know very well what the effect of an award of arbitrators is, that it is final and conclusive upon all the facts in the case, and the controversy cannot be inquired into either by the parties or by the court. The duty of the court is a merely formal act then, or nearly so, to enter judgment upon the award, and that makes an award of an arbitrator a practical determination of a controversy. The only way in which the award of arbitrators can be impeached, according to the act of Maryland, is on the ground of fraud, malpractice, or where notice has not been served upon the parties, etc., and if a party desires to file exceptions it must be done with proof of this description in order to impeach it; otherwise the order must stand, and this appears to be the result of our own rules upon the subject."

In cases of a common-law arbitration the rule is that laid down by this Court in Burchell *vs.* March, 17 How., 349. In that case a bill in equity had been filed to set aside an award, and the Court say:

"Arbitrators are judges chosen by the parties to decide the matters submitted to them finally and without appeal. As a mode of settling disputes it should receive every encouragement from courts of equity. If the award is within the submission and contains the honest decision of the arbitrators after a full and fair hearing of the parties, a court of equity will not set it aside for error *either in law or in fact.* A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation."

See also—

Smith *vs.* Morse, 9 Wall., 82.

Morse on Arbitration and Award, chap. X, 291 to 338.

"Courts of justice in their latest decisions have manifested a disposition to treat awards with more liberality than formerly. Everything is to be intended in favor of an award."

Caton *vs.* McTavish, 10 G. & J., 192.

This has ever since been the rule in Maryland. See—

Ebert *vs.* Ebert, 5 Md., 359.

Roloson *vs.* Carson, 8 Md., 220 to 222.

Garitee *vs.* Carter, 16 Md., 309.

Maryland, etc., R. R. Co. *vs.* Porter, 19 Md., 458.

Willard *vs.* Hersey, 22 Md., 89.

VI.

There was no error in granting the plaintiff's first prayer (41).

What has been said under the second assignment of error applies to this point.

VII.

The court did not err in refusing to instruct the jury to find a verdict for the defendant.

It might reasonably have been expected that the appellant's counsel would have pointed out some supposed mistake of law on the part of the arbitrator, since his alleged errors of law have been one of the excuses set up by the District for not abiding by his award, but counsel content themselves with informing the Court that Colonel Greene testified one way as to certain facts in the case, and that Francis D. Bailey, the plaintiff's son, gave testimony in favor of her contention. The only fault that is found with the award in the opposing brief is that it was against the evidence. But, under the general law of arbitration the Court cannot look at the evidence, and in this case only a small part of the evidence was filed by the arbitrator and the trial court refused to incorporate that part (48 to 78) in the bill of exceptions because it had not been offered in evidence at the trial (78). If the Court looks at the meagre part of the evidence before the referee contained in this record (48 to 78), it will find that as to the damages claimed for violation of the contract there was evidence on both sides, and that as to the claim for extra work all the evidence was on the side of the plaintiff.

Having nothing better to urge against the award, the appellant's brief closes with the suggestion that the course pursued by Mrs. Bailey's counsel in endeavoring to enforce the award is properly stigmatized as "jugglery with judicial proceedings."

On this subject all we have to say is that we will be greatly obliged if the counsel for the District at the argument of this case will point out any method other than the one pursued by which the question whether the parties sub-

mitted the case to Mr. Johnson as an arbitrator and agreed to accept his award as final, or intended that he should make a report to the court for its action thereon, could be determined by a court and jury.

As to the decision of the Court of Appeals when the case was first before it, it will be seen that it then stood upon a motion for judgment for want of a sufficient affidavit of defense. Of course, then, all the statements of the affidavit were to be taken as true. One of those statements was that "the alleged reference of said cause to the said Johnson, as we are informed and believe, was for the purpose of ascertaining and reporting to the court the facts in said case to be reviewed by the court as the basis for its judgment, and was never, as we are informed and believe, referred to the said Johnson, as arbitrator, by order of court or consent of the parties, nor did the said Johnson make or profess to make any award in the said cause" (15). The opinion of the Court of Appeals was put upon the ground "that the referee, as well as the parties to the action, understood that the award should be returned to and filed in that cause for final judgment" (4 Ap. Cas., 366–'7); and the court then also laid stress upon the fact that it was a suit against a municipal corporation, and those in charge of the affairs of the corporation at the time the suit was brought might know little or nothing of the special facts of the transaction.

But upon the evidence disclosed in the record now it is apparent that it was impracticable to enforce the award in the original case. A dispute arose between the parties as to whether the matter was submitted to Mr. Johnson as a common-law arbitrator or with the purpose of having him make a report which should be reviewed by the court. There were no pleadings in the original case upon which that question could have been decided, and counsel have failed to suggest any way in which there could have been engrafted upon it any such pleadings. The parties were

entitled to a trial by jury of the question which had thus arisen between them, and the simplest, if not the only, way in which that question could have been put in process of adjudication by a court and jury was by bringing an action upon the award.

CONCLUSION.

It will be seen that the position taken by the attorneys for the District of Columbia in this case is technical to the last degree. On the merits there was in fact but one question in controversy between the parties, and that was the question of fact, which the jury settled in the plaintiff's favor, whether the submission of the case to Mr. Johnson was absolute, as contended by the plaintiff, or qualified, as contended by the defendant.

Even if we assume that the counsel for the District are right in claiming that the court should have disposed in the original action of the questions in suit, the result would be the same. The exceptions filed by the District to the report or award all went to the sufficiency of the evidence to sustain the findings of the arbitrator, except the fourth and last exception, which was in general terms based upon "plain and palpable errors of law apparent on the face of the award" (4). The jury having found that the submission was absolute, the trial court, in determining whether it should grant the motion of the plaintiff's counsel to enter judgment on the award, could not consider the evidence, even if it had been all filed with the award; and as to errors of law, the exception was manifestly insufficient, because it mentioned no specific error. Even at the trial no attempt was made to point out any such specific error. Neither in the brief in the Court of Appeals nor in the brief here have counsel for the District suggested any error

of law, palpable or otherwise, apparent on the face of the award. Hence, if the judgment below in the action last brought should be set aside on the ground that the sufficiency of the award should have been determined in the first suit, it would follow that the judgment in the first suit should be set aside also, and the court below directed to enter a judgment in that case on the award for the amount thereof, with interest thereon from the date when the award was made.

Several cases are cited in the opposing brief in support of their proposition that the submission to arbitration of a pending action at law will not necessarily of itself work a discontinuance of the action. On the other hand, it has been frequently held that the effect of such reference is to discontinue the pending suit (Miller *vs.* Underhill, 1 John., 315; Johnson *vs.* Parmley, 17 John., 129; Camp *vs.* Root, 18 John., 22; Dodge *vs.* Waterbury, 8 Cowen, 136; Rathbone *vs.* Lownsbury, 2 Wend., 595; Town *vs.* Wilcox, 12 Wend., 503; Green *vs.* Patchin, 13 Wend., 293; Moore *vs.* Allen, 35 Maine, 276; Crooker *vs.* Buck, 41 Maine, 355; Eddings *vs.* Gillespie, 12 Heisk., 548; Jewel *vs.* Blankenship, 10 Yerg., 439; Muckey *vs.* Pierce, 3 Wis., 276; Cunningham *vs.* Craig, 53 Ill., 252). Frequently where such a reference has been made and acted upon, the court, upon motion of the successful party, has entered an order of reference *nunc pro tunc*. Much seems to depend upon the intention of the parties. When a question arises, after the arbitrator has made his award in pursuance of an oral agreement, as to what that agreement was, there is a practical difficulty in going on with the original suit which would seem to be insurmountable, unless both parties waive their right to a trial of that question by a jury and agree to submit it to the court.

In this case the parties stood on their rights, and a second action could not be avoided.

It is respectfully submitted that the judgment of the Court

of Appeals in both these cases should be affirmed; that if the judgment of that court in case No. 390 should be reversed its judgment in case No. 420 should also be reversed; that in that case the Court of Appeals should be instructed to remand the latter case to the supreme court of the District of Columbia, with instructions to enter judgment in that case on the award in the sum of $10,519.20, with interest from July 18, 1892, and costs.

A. S. WORTHINGTON,

Attorney for Elizabeth L. W. Bailey, Administratrix.

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DISTRICT OF COLUMBIA *v.* BAILEY.

BAILEY *v.* DISTRICT OF COLUMBIA.

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ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

Nos. 390, 420. Submitted January 10, 1898. — Decided May 31, 1898.

The commissioners of the District of Columbia have no power to agree to a common law submission of a claim against the District.

On July 30, 1879, a contract for resurfacing with asphaltum certain streets in the city of Washington was awarded to

The Bailey-French Paving Company. The agreement was embodied in a writing signed on the one part by Davis W. Bailey as general agent of the company just named, and on the other part signed and sealed by the Commissioners of the District of Columbia. The price specified for the work aggregated a little less than $41,000. On February 12, 1880, when about three fourths of the work to be done under this contract had been completed and about $36,000 earned therefor, including $5784.14 allowed for extra work, the Commissioners notified Bailey that no more work could be performed under the contract, because of the fact that the appropriation made by Congress for the work in question was exhausted. Subsequently, on February 24, 1883, Davis W. Bailey, claiming that he was in fact The Bailey-French Paving Company, instituted an action at law in the Supreme Court of the District of Columbia against the District of Columbia to recover $25,000 as damages, averred to have been sustained by the cessation of the work under the contract. The District, on April 4, 1883, filed pleas, claiming a set-off of $1312.30 for damages alleged to have been sustained by improper performance of the work of resurfacing; averring the termination of the contract by reason of the appropriation having been exhausted; and alleging that the time within which the contractor had stipulated to complete the work had expired long prior to the cancellation of the contract. The plaintiff joined issue and filed a replication on April 18, 1883.

On June 19, 1883, Bailey died. His widow was appointed administratrix, and the action against the District was revived in her name.

On September 16, 1891, the attorney for the claimant addressed a letter, on behalf of the administratrix, to the Commissioners of the District of Columbia, calling attention to the pending case, stating that "the ground of said suit is for breach of contract," reciting the facts as to the making of the contract and the mode by which it was terminated, and claiming that, at the time of such cancellation, Bailey had expended for machinery necessary to the performance of the contract $10,180; that he had at the time stock on hand,

Statement of the Case.

$7000; that the profit on the unexecuted balance of the work would have been $8000; that there was due under the contract for an extra one half inch of surfacing $5000. These items were stated in the letter to amount to $31,180, but only aggregate $30,180. Without calling the attention of the Commissioners to the fact that the item of five thousand dollars for an extra half inch of resurfacing was not asserted in the declaration in the pending suit, the attorney for the administratrix proceeded to refer to the defences interposed in such suit on behalf of the District, and next stated the claim made by the contractor in his replication, that the delay in the work was the fault of the District. The conclusion of the letter, omitting references to immaterial matters, was as follows:

"Now, having stated the principal facts which bear upon this case, that you may have sufficient knowledge to act in the premises, I write to ask if you will appoint some good man as a referee or arbitrator to whom this case may be referred, with power to hear the evidence and make an award which shall be accepted, whether for or against us, as a final settlement of this long and much litigated case."

This communication was referred by the Commissioners to the attorney for the District, who endorsed thereon under date of October 17, 1891:

"This is a case which has been pending in the court for a long time and it ought to be disposed of. If it could be referred to some first-class referee, who will give us a full hearing, it would be a very good way of disposing of it, and I should favor such a reference, as we can then attend to it at our convenience."

A memorandum was also sent by one of the Commissioners to the assistant attorney for the District, which read as follows:

"Thomas: Think of some good names for a referee, and talk with us about this case.

"October 27, 1891. J. W. D."

A memorandum in pencil, evidently having reference to the foregoing, is as follows:

"Ans. Mr. Douglass. Comm'rs think this case should be settled in court."

On October 28, 1891, Assistant Attorney Thomas sent the following letter:

"To the Hon. Commissioners, etc., etc.:

"GENTLEMEN: I return to you herewith a communication from W. Preston Williamson, Esq., relative to the case of *Bailey* v. *The District of Columbia*, referred to me with the request that I give you the name of some one who would make a good referee.

"I would suggest either Mr. A. B. Duvall or Mr. J. H. Lichliter, both members of the bar and well qualified to decide the issues in that case.

"Very respectfully,

"S. T. THOMAS, *Ass't Att'y D.C.*"

The next document referring to the matter is the following:

"OFFICE OF THE
"COMMISSIONERS OF THE DISTRICT OF COLUMBIA,
"WASHINGTON, *January* 11, 1892.

"Ordered, that J. J. Johnson is hereby appointed referee in the matter of the suit of *Bailey, Administratix of Bailey, deceased*, v. *District of Columbia.*

"Official copy furnished Mr. J. J. Johnson.

"By order: W. TINDALL, *Secretary.*"

Under this appointment, on February 17, 1892, the attorneys for the respective parties appeared before Mr. Johnson. It was claimed by witnesses for the plaintiff at the trial of the action subsequently brought to enforce the finding of the referee, that at the commencement of the hearing the latter gentleman, as well as the attorney for the administratrix, raised the question whether or not under the order of appointment the decision of the referee was to be final, and were assured by the attorney for the District that the decision of Mr. Johnson was to be a final determination of the case.

Such witnesses also testified that subsequently, when a question arose with respect to permitting an amended declaration to be filed, setting up a claim for an extra half inch of resurfacing, the referee and attorneys discussed as to whether the decision of the referee "was to wind up finally the whole matter," and an affirmative conclusion was arrived at. No attempt, however, was made to obtain from the Commissioners of the District any modification or amplification of the writing of January 11, 1892.

The hearing before the referee was concluded on July 18, 1892, when Mr. Johnson placed on the files of the Supreme Court of the District of Columbia in action numbered 24,279 his report as referee. The report did not refer to the mode by which its author had become referee. It was entitled in the cause, purported to contain a synopsis of the pleadings, the plaintiff's claim, a statement of the facts and the findings of "J. J. Johnson, referee." The report concluded as follows:

"Upon the evidence and the law I have allowed the plaintiff for the unexecuted balance of 11,385 square yards, $4440.15, being the profit between the cost of resurfacing the streets at fifty cents per square yard and eighty-nine cents, the price received, and for the extra one half inch I have allowed the plaintiff $6079.05, at the contract price, aggregating the sum of $10,519.20. I do therefore find that there is due to the plaintiff from the defendant the sum of $10,519.20, besides costs."

The referee also fixed his fee at $550, which was paid by the administratrix.

On September 23, 1892, exceptions were filed on behalf of the District to this report. Upon the exceptions, the attorney for the plaintiff made the following endorsement: "I consent that these exceptions be filed *nunc pro tunc*." On March 10, 1893, a motion for judgment was filed on behalf of the plaintiff.

Without action being had on the exceptions and motions referred to, the administratrix of Bailey, on August 8, 1893, instituted an action at law, numbered 34,564, in the Supreme

Court of the District of Columbia, seeking to recover from the District the sum of $10,519.20, basing the right to such recovery upon the claim that the finding of Mr. Johnson was, in fact, a final decision and award. In the affidavit filed with the declaration, as authorized by the rules of practice of the court, what purports to be a copy of the resolution appointing Mr. Johnson referee is set out, but the words "of the suit" are omitted from before the words "of Bailey, administratrix." On September 2, 1893, pleas were filed on behalf of the District, denying that it had agreed to submit the matters of difference referred to in the declaration to the award and arbitrament of Johnson, and averring that Johnson had not made an award concerning the same. The various steps in the original action (No. 24,279) were stated, and it was alleged that motions to set aside said award and for judgment were still pending. It was also averred that the alleged award was not under seal and was never delivered to the defendant; that the defendant never undertook and promised in the manner and form as alleged, and that the District was not indebted as alleged. The plaintiff joined issue. On October 8, 1895, on motion of the plaintiff, the two causes were consolidated. While the motion to consolidate was opposed by the District, no exception was taken to the entry of the order of consolidation.

The consolidated action came on for trial January 13, 1896. At the trial W. Preston Williamson, a witness for the plaintiff, testified that he had sent to the Commissioners the communication of September 16, 1891. Under objection and exception he was permitted to testify to conversations had separately with two of the Commissioners, which tended to show that in the event of the appointment of an arbitrator or referee, it was the intention of the Commissioners to submit to the individual selected as referee or arbitrator the final determination of the entire controversy referred to in Williamson's letter. Also under objection and exception, the witness testified that after the order appointing Mr. Johnson referee was made by the Commissioners, he and the attorney for the District, in the presence of the referee, discussed the scope of

the submission, and agreed that the decision of the referee was intended by the parties to the controversy to be a final disposition of the whole matter. The indorsements on the letter of Mr. Williamson, the letter of the assistant attorney of the District, and other memoranda heretofore set out were put in evidence on behalf of the plaintiff. Mr. Hazleton, a former attorney for the District, also testified for the plaintiff, in substance, under objection and exception, that it was the intention of the Commissioners, as he knew from oral statements made to him by two of the Commissioners, that the appointment of a referee would be for the purpose of ending the whole controversy, and that nothing occurred between the time of the appointment of the referee and the making of the report to change that understanding. He also testified as to the filing of the amended declaration before the referee, setting up the claim for an extra half inch of resurfacing, which was not embraced in the pending suit at the time the referee or arbitrator was appointed.

J. J. Johnson also testified on behalf of the plaintiff, under objection and exception, as to the understanding had with him at the hearing before him as referee, by the counsel for the respective parties, regarding the finality of any decision made by him, and as to the filing of the amended declaration for the extra half inch of resurfacing. He testified that he filed the report made by him in court of his own motion, and averred that certain written matter filed with his report was not a part of the report, and that it did not contain all the evidence, though it contained all the oral testimony given before him.

The report was next put in evidence, objections being first separately interposed to its introduction on the grounds: (1,) that the papers and evidence attached thereto should also be put in evidence; and, (2,) that the referee was without authority to make an award. To the overruling of each objection the defendant duly excepted.

John W. Douglass, one of the Commissioners for the District in office at the time of the appointment of the referee, testified on behalf of the plaintiff that the intention of the

Commissioners was to make the reference final. The evidence for the plaintiff was closed with the testimony of the plaintiff, who stated, in effect, that the letter of September 16, 1891, had been sent to the Commissioners with her approval, and that nothing had been paid her on account of the award. For the defendant, John W. Ross, who was a Commissioner at the time of the appointment of Mr. Johnson, testified that he was an attorney-at-law, knew the difference between an arbitration and order of reference for a report, and that his understanding when the appointment of Mr. Johnson as referee was made was that the appointment was not of an arbitrator, but was simply one of reference. He further testified "there was no record of the appointment of the referee, except the one in evidence, unless the pencil memorandum may be taken as a record." The witness denied that he made statements attributed to him by the witnesses for the plaintiff, to the effect that it was the intention of the Commissioners that the decision of Mr. Johnson should be final.

After Mr. Ross had concluded his testimony, the record and proceedings in action No. 24,279 were introduced in evidence on behalf of the defendant. On the settlement of the bill of exceptions a dispute arose as to whether the papers attached to the report of the referee had been put in evidence by the offer made, but it is unnecessary to notice the action taken by the trial court with respect to that controversy.

In rebuttal, Mr. Williamson reiterated statements as to alleged declarations of Mr. Ross regarding the finality of the decision of the referee. On cross-examination he said:

"That he wrote the letter of September 16, 1891, at his office, 912 F street; that he did not know why the District filed exceptions, as it was understood that the report was to be final; that witness filed the motion to confirm the award because he thought it the best thing, the only thing, that could then be done, and that he thought it would be simply a matter of form, and he would have confirmation at once of the award, and that the money would be paid; but the District, instead of doing that, violated its agreement; that witness

did not remember ever consenting to the filing of exceptions to the award. Now that counsel shows him the paper which is the exception to the award, witness remembers that he signed the paper consenting that the exceptions should be filed *nunc pro tunc.* Mr. Richardson came to him and asked him if he would make any special objection to the exceptions being filed; that it ought to be filed, so that the District might make their objections, and for that purpose he did it, and did not consent to it because he thought it was not final; that there was not a copy of the award served by him on the Commissioners; that Mr. Johnson was their arbitrator, and it was not for witness to serve them with a copy."

The evidence was then closed. The trial judge granted a request of the defendant that the jury be instructed to render a verdict for the defendant in the first action, and an exception was duly noted on behalf of the administratrix. The trial judge also granted a request of counsel for the plaintiff, in substance that the jury be instructed to find for the plaintiff if they found from the evidence that the Commissioners accepted the proposition contained in Mr. Williamson's letter, that in pursuance of such acceptance the Commissioners made the order of January 11, 1892, and that the hearing before Mr. Johnson was proceeded with under such appointment, and the declaration amended at the hearing by consent of counsel. An exception was taken to the granting of this instruction.

The following requests for instructions were then asked on behalf of the defendant, which, being overruled, separate exceptions were noted:

"2. The jury are instructed, on the whole evidence in cause No. 34,564, they are to render a verdict for the defendant.

"3. The jury are instructed that the Commissioners of the District of Columbia were without authority to agree to submit the matters in controversy in the case of *Bailey, Adm'r,* v. *The District of Columbia,* at law, No. 24,279, to the final award of an arbitrator, but that said Commissioners had authority to agree to refer the case for the award and report of a referee, subject to the approval of the court."

"5. The jury are instructed that the plaintiff, as adminis-

tratrix of the estate of her deceased husband, was without authority to agree to refer the claim of the estate to arbitration without the previous direction of the Supreme Court of the District of Columbia, holding a special term for orphans' court business."

The bill of exception also states that exceptions were taken on behalf of the District to portions of the general charge of the court contained in brackets, but no portion of the charge, as contained in the printed record, is so marked.

A verdict was returned finding in favor of the defendant in action No. 24,279, and in favor of the plaintiff for $10,519.20 and interest in action No. 24,564. Judgment was subsequently entered upon the verdict, and both parties prosecuted error. The Court of Appeals of the District having affirmed the judgment, 9 App. D. C. 360, each party obtained the allowance of a writ of error from the court, and the consolidated cause is now here for review.

Mr. Sidney T. Thomas and *Mr. Andrew B. Duvall* for the District of Columbia.

Mr. A. S. Worthington for Bailey.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court.

The decision of this controversy involves two propositions. Did the Commissioners of the District of Columbia have the power to agree to submit the claim in issue to the award of an arbitrator? And if they did have the power, did they lawfully exercise it? To answer either of these questions it becomes essential to ascertain whether an agreement to submit to arbitration involves the power to contract. Both of the matters above stated depend upon this last inquiry, because both the claim that the District of Columbia did not in valid form exercise the power to submit to arbitration, and the assertion that if they so did they were not authorized to that end, rest on the claim that the submission was not made in

the form required by law to constitute a contract, and even if the alleged award was in legal form, nevertheless the District Commissioners were without power to contract for that purpose.

In determining whether an agreement to arbitrate involves the power to contract we eliminate at once from consideration consents to arbitrate made under a rule of court, by consent, in a pending suit, and shall consider only whether an agreement to arbitrate not under rule of court or within the terms of a statute enacted for such purpose is or is not a contract. We do this, because there is no pretence in the case at bar that the submission to arbitration was under a rule of court or equivalent thereto. Indeed, the courts below held that the submission of the claim in question to arbitration was a purely common law one and not made under a statute or rule of court; and in consequence of these views the courts held it to be their duty to make the award executory by rendering a judgment thereon, on the assumption that the parties having agreed to a common law submission were bound by reason thereof to abide by the award of the arbitrator.

The general rule is, "that every one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award; but no one can, who is either under a natural or civil incapacity of contracting." Kyd, p. 35; Russell on Arbitrators, p. 14. And Morse, in the opening paragraph of his treatise on Arbitration and Award (p. 3), says: "A submission is a contract." And again, at p. 50: "The submission is the agreement of the parties to refer. It is, therefore, a contract, and will in general be governed by the law concerning contracts." In *Whitcher* v. *Whitcher*, 49 N. H. 176, the Supreme Court of New Hampshire said (p. 180): "A submission is a contract between two or more parties, whereby they agree to refer the subject in dispute to others and to be bound by their award, and the submission itself implies an agreement to abide the result, even if no such agreement were expressed." It was because a submission to arbitration had the force of a contract, that at common law a submission by a corporation aggregate was required to be

the act of the corporate body, Russell on Arbitrators, fifth edition, p. 20; which act was of necessity required to be evidenced in a particular manner.

It is true that an executor, at common law, had the power to submit to an award. But this power arose by reason of the full dominion which the law gave the executor or administrator over the assets, and the full discretion which it vested in him for the settlement and liquidation of all claims due to and from the estate. *Wheatley* v. *Martin*, 6 Leigh, 62; *Wamsley* v. *Wamsley*, 26 W. Va. 45; *Wood* v. *Tunnicliff*, 74 N. Y. 38. Whilst, however, the agreement of the executor to a common law submission was binding upon him, such a consent on his part did not protect him from being called to an account by the beneficiaries of the estate, if the submission proved not to be to their advantage, because the submission was the voluntary act of the executor and was not the equivalent of a judicial finding. 3 Williams on Executors, p. 326, and authorities cited. So, also, the power of a municipal corporation to arbitrate arises from its authority to liquidate and settle claims, and the rule on this subject is thus stated by Dillon (Mun. Corp. 4th ed. sec. 478):

"As a general proposition, municipal corporations have, unless specially restricted, the same powers to liquidate claims and indebtedness that natural persons have, and from that source proceeds power to adjust all disputed claims, and when the amount is ascertained to pay the same as other indebtedness. It would seem to follow therefrom that a municipal corporation, unless disabled by positive law, could submit to arbitration all unsettled claims with the same liability to perform the award as would rest upon a natural person, provided, of course, that such power be exercised by ordinance or resolution of the corporate authorities."

In the early case of *Brady* v. *Brooklyn*, 1 Barb. 584, 589, the power of a municipal corporation to submit to arbitration was ascribed to the capacity to contract, with a liability to pay, and it was held that corporations have all the powers of ordinary parties as respects their contracts, except when they are restricted expressly, *or by necessary implication*. In the

case of minor public officials or corporations, such as selectmen and school districts, the power to arbitrate has been clearly rested upon the existence of the right to adjust and settle claims of the particular character which had been submitted to arbitration. *Dix* v. *Dummerston*, 19 Vermont, 262; *Walnut* v. *Rankin*, 70 Iowa, 65. Indeed, the proposition that an independent agreement to submit to an award must depend for its validity upon the existence of the right to contract is so elementary that further citation of authority to support it is unnecessary.

Examining, then, the questions we have stated in their inverse order, we proceed to inquire whether the Commissioners of the District of Columbia had the power to enter into a contract of the nature of that under consideration. The solution of this inquiry requires a brief examination of the statutes, from which alone the powers of the Commissioners of the District are derived.

By the act of June 20, 1874, c. 337, "An act for the government of the District of Columbia, and other purposes," 18 Stat. 116, the commission provided for in section 2 was vested with the power and authority of the then governor or board of public works of the District, except as thereinafter limited, and it was provided that "said commission, in the exercise of such power or authority, shall make no contract, nor incur any obligation other than such contracts and obligations as may be necessary to the faithful administration of the valid laws enacted for the government of said District, to the execution of existing legal obligations and contracts, and to the protection or preservation of improvements existing, or commenced and not completed, at the time of the passage of this act."

By the act of June 11, 1878, c. 180, "An act providing a permanent form of government for the District of Columbia," 20 Stat. 102, the District and the property and persons therein were made subject to the provisions of the act, "and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this act." The Commissioners provided for in the act were, by section 3, vested with

all the powers, rights, duties and privileges lawfully exercised by, and all property, estate and effects vested in the Commissioners appointed under the provisions of the act of June 20, 1874, and were given power, subject to the limitations and provisions contained in the act, to apply the taxes or other revenues of the District to the payment of the current expenses thereof, to the support of the public schools, the fire department and the police. It was expressly enacted, however, in the same section, that the Commissioners in the exercise of the duties, powers and authority vested in them "shall make no contract, nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress." In the same section it was further provided that the Commissioners should annually submit to the Secretary of the Treasury, for his examination and approval and transmission by him to Congress, a statement "showing in detail the work proposed to be undertaken by the Commissioners during the fiscal year next ensuing, and the estimated cost thereof; also the cost of constructing, repairing and maintaining all bridges authorized by law across the Potomac River within the District of Columbia, and also all other streams in said District; the cost of maintaining all public institutions of charity, reformatories and prisons belonging to or controlled wholly or in part by the District of Columbia, and which are now by law supported wholly or in part by the United States or District of Columbia; and also the expenses of the Washington Aqueduct and its appurtenances; and also an itemized statement and estimate of the amount necessary to defray the expenses of the government of the District of Columbia for the next fiscal year." Of the estimates as finally approved by Congress, the act provided that fifty per cent should be appropriated for by Congress, and the remaining fifty per cent assessed upon the taxable property and privileges in the District other than the property of the United States and of the District of Columbia. In the fifth section of the act provision was made for the letting by contract, after due advertisement, of all work of repair on streets, etc., where the cost would exceed one thou-

sand dollars, and it was also, in said section, stipulated that "all contracts for the construction, improvement, alteration or repairs of the streets, avenues, highways, alleys, gutters, sewers and all work of like nature shall be made and entered into only by and with the official unanimous consent of the Commissioners of the District, and all contracts shall be copied in a book kept for that purpose and be signed by the said Commissioners, and no contract involving an expenditure of more than one hundred dollars shall be valid until recorded and signed as aforesaid."

By section 37 of the act of February 21, 1871, c. 62, 16 Stat. 419, 427, it was provided as follows:

"All contracts made by the said board of public works shall be in writing, and shall be signed by the parties making the same, and a copy thereof shall be filed in the office of the Secretary of the District, and said board of public works shall have no power to make contracts to bind said District to the payment of any sums of money except in pursuance of appropriations made by law, and not until such appropriations shall have been made."

This section is deemed to be applicable to the present Commissioners. (Comp. Stat. Dis. Col. secs. 30 and 31, pp. 201–2.) So, also, by section 15 of the act of 1871, 16 Stat. 423, it was provided that the legislative assembly should not "authorize the payment of any claim, or part thereof, hereafter created against the District under any contract or agreement made, without express authority of law, and all such unauthorized agreements or contracts shall be null and void."

Section 13 of the joint resolution of June 1, 1878, embodies the second section of the joint resolution approved March 14, 1876, 19 Stat. 211, 212, which made it a misdemeanor for any officer or person to increase or aid or abet in increasing the total indebtedness of the District.

Under the statutes of 1874 and 1878, above referred to, it has been held that the District of Columbia still continued to be a municipal corporation; and that it was subject to the operation of a statute of limitations, *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U. S. 1, and was also liable

for damages caused by a neglect to repair the streets within the District. *District of Columbia* v. *Woodbury*, 136 U. S. 450. But the mere fact that the District is a municipal corporation is not decisive of the question whether or not the Commissioners of the District had power to make a contract to submit to an award, for, as we have seen, it is not the mere existence of a municipal corporate being from which the power to make a submission to arbitration is deduced, but that the municipal corporation by which such an agreement is entered into has power to contract, to settle and adjust debts; in other words, all the general attributes which normally attach to and result from municipal corporate existence. Recurring to the statutes relating to the Commissioners of the District of Columbia, it is clear from their face that these officers are without general power to contract debts, or to adjust and pay the same; that, on the contrary, the statutes expressly deprive them of such power, and limit the scope of their authority to the mere execution of contracts previously sanctioned by Congress or which they are authorized to make by express statutory authority. The necessary operation of these provisions of the statutes is to cause the District Commissioners to be merely administrative officers with ministerial powers only. The sum of the municipal powers of the District of Columbia is neither vested in nor exercised by the District Commissioners. They are, on the contrary, vested in the Congress of the United States, acting *pro hac vice* as the legislative body of the District, and the Commissioners of the District discharge the functions of administrative officials.

There is no authority for holding that a mere administrative officer of a municipal corporation, simply because of the absence of a statutory inhibition, has the power, without the consent of the corporation speaking through its municipal legislative body, to bind the corporation by a common law submission. And this being true, with how much less reason can it be contended that the administrative officers of the District have such power without the consent of Congress; when the acts defining the powers of the Commissioners, by clear and necessary implication, contain an express prohibition to the contrary?

Nor is it in reason sound to say that because the District Commissioners have the power to sue and be sued, they have therefore the authority to enter into a contract to submit a claim preferred against the District to arbitration, and thus to oust the courts of jurisdiction, when no authority is conferred upon the Commissioners to contract to pay a claim of the character embraced in the arbitration, and no appropriation had been made by Congress for the payment of any such claim. It cannot be said that because Congress had appropriated for the improvement of streets, and therefore authorized a contract for such improvement to the extent of the appropriation, that it had also authorized and appropriated for a claim in damages asserted to have arisen from the fact that work had been stopped because the appropriation made by Congress had been exhausted. The appropriation of money to improve streets was in no sense the appropriation of money to pay a claim for unliquidated damages arising, not for work and labor performed and materials furnished, but from the refusal to permit the performance of work and labor and the furnishing of materials.

Aside from the prohibition imposed on the Commissioners of the District by the acts of Congress against entering into contracts for the payment of money for any claim not specifically appropriated for, an agreement to submit the claim in question to the arbitrament of a single individual was, if valid, a contract binding the District to pay any sum of money which the arbitrator might award. It cannot be doubted that if the District Commissioners themselves had seen fit to pass a resolution reciting that the appropriation by Congress for the improvement of the streets had been exhausted, and that a given sum of money was set aside to pay a claim for damages preferred against the District for having contracted when there was no appropriation, such action would have been, under the statutes, *ultra vires*. But if the express action of the Commissioners to this end would have been void, how can it be contended that by indirection, that is, by entering into an agreement to submit to an award, the Commissioners had the power to delegate to a third person an authority which

they themselves did not possess? Whilst the fundamental want of power in the District Commissioners to agree to a common law submission is decisive, there is another view which is equally so. By the express terms of the statute the Commissioners are forbidden to enter into any contract binding the District for the payment of any sum of money in excess of one hundred dollars, unless the same is reduced to writing and is recorded in a book to be kept for that purpose, and signed by all the Commissioners, the statute declaring, in express terms, that no contract shall be valid unless recorded as aforesaid. This mandatory provision of the statute clearly makes the form in which a contract is embodied of the essence of the contract. In other words, by virtue of the restrictions and inhibitions of the statute a contract calling for an expenditure in excess of one hundred dollars cannot take effect unless made in the form stated. The form, therefore, becomes a matter of fundamental right, and illustrates the application of the maxim *forma dat esse rei.* That the mere statement of the appointment of a referee on the minutes without the signature of any of the Commissioners did not comply with the requirements referred to, is too clear for discussion. The attempt to give effect to such entry as a contract without regard to the requirements of the law illustrates the wisdom of the statute and the evil of disregarding it, for on the trial two of the three commissioners testified, one on behalf of the plaintiff and the other on behalf of the defendant, and swore to directly opposite views as to whether or not there had been a common law submission by the Commissioners.

We have considered what has been referred to by counsel as the order of the Commissioners, according to its terms, which embraced only the matters contained in the action then pending, and have not regarded the parol evidence which sought to vary and contradict the writing by establishing that it was intended thereby to embrace a claim which had not been asserted in the action. The views we have advanced being decisive against the legality of the alleged award, it follows that the judgment in favor of the administratrix based thereon must be reversed. As, however, the consolidation of

the action upon the award with the original action for damages for breach of the contract for the resurfacing, and the trial of such consolidated cause, proceeded upon the hypothesis that a valid agreement to arbitrate had been entered into, the ends of justice will be subserved by also reversing the judgment in favor of the District entered in the original action. It is therefore ordered that the judgments be

Reversed and the cases remanded, with directions to dismiss the action No. 34,564 *founded upon the alleged award, and to grant a new trial in action No.* 24,279.